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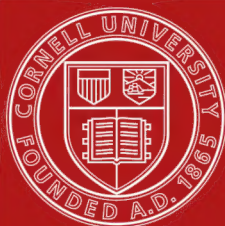
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A TREATISE
ON THE
LAW OF TORTS
OR THE
WRONGS

WHICH ARISE
INDEPENDENTLY OF CONTRACT.

By THOMAS M. COOLEY, LL. D.

THIRD EDITION.

By JOHN LEWIS,
OF THE CHICAGO BAR,
AUTHOR OF "A TREATISE ON THE LAW OF EMINENT DOMAIN," ETC

VOLUME I.

CHICAGO:
CALLAGHAN & COMPANY.
1906.

B13353.

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PREFACE TO THE THIRD EDITION.

Eighteen years have elapsed since the last edition of this work was published. In the meantime the distinguished author of the work has passed away and the work itself has become established as the standard authority on the subject of which it treats. During these years litigation on the subject of torts has greatly increased, involving new questions and new applications of old doctrines. From the vast number of new decisions rendered, about eight thousand of the more important have been selected and incorporated into the text, making a total citation in the present edition of nearly twenty thousand cases. In order to present in a fitting manner the results of these new decisions, the expansion of the work into two volumes was an inevitable necessity. Judge Cooley's text has not been changed except by the insertion of new matter and, as the former editions have been received with great favor, the aim has been to make the new edition conform to the plan and purpose of the original design.

JOHN LEWIS.

CHICAGO, October, 1906.

PREFACE TO THE FIRST EDITION.

In preparing the following pages the purpose has been to set forth with reasonable clearness the general principles under which tangible and intangible rights may be claimed, and their disturbance remedied in the law. The book has been written quite as much for students as for practitioners, and if some portions of it are more elementary than is usual in similar works this fact will supply the explanation.

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN, ANN ARBOR, December, 1878.

PREFACE TO THE SECOND EDITION.

A new edition of this work having been rendered important by the great number of decisions made since it was published upon points of law stated or referred to in it, Mr. ALEXIS C. ANGELL, of the Detroit bar, has been engaged to prepare it, and has done so with great pains and thoroughness. It is believed that every important case which has appeared in the regular series of reports since the date of the original publication will be found referred to in the appropriate place and the point of decision given. The text of the first edition was not found to require material modification, and it has been preserved substantially unchanged.

THOMAS M. COOLEY.

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THE LAW OF TORTS.

CHAPTER I.

THE GENERAL NATURE OF LEGAL WRONGS.

The purpose in the establishment of judicial tribunals is to prevent the commission of wrongs; to compel redress to those who have suffered from them, and to inflict punishment in proper cases on those guilty of their commission. In order that this may be effected the power of the State is placed at the command of the judges, and a trained body of men is always at hand to assist by their advice, and to guard by the results of their labor and investigations against any departure from correct principles. In a political society where intelligence is steadily increasing, and where public and private morality are commonly believed to gain in strength and vigor in corresponding ratio, it might be supposed that the occasions for judicial interference in the affairs of the citizen would continually grow less and less numerous, in proportion as the people acquire the capacity to understand their rights and duties, and the disposition to respect the rights of others. The contrary, however, is most indubitably the fact. The increase in intelligence, and especially the new inventions and improvements which follow it, have a powerful tendency in the direction of creating new wants and desires, and of establishing people in new occupations, and as these increase, the interests, desires and passions of men must necessarily breed more frequent controversies. Moreover, every recognition by

the law of a new right, is likely to raise questions of its adjustment to, and its harmony with, existing rights previously [*2] enjoyed *by others; and in consequence thereof people in the honest assertion of their supposed rights are brought in conflict, and one or the other is found to be chargeable with legal wrong, though no purpose has existed to do otherwise than strictly to obey the law. The effect upon the business of judicial tribunals is very marked and striking.

In a primitive state of society, while occupations are few and the transactions of business and trade are simple, the judge is seldom called upon to give redress, except for lawless and reckless conduct, where only the facts are in dispute. In the more advanced society his attention is invited to invasions of copyrights and patents, to frauds accomplished by new and peculiar methods, to questions in the law of common carriers, which are intimately connected with the new improvements in methods of transportation, and to a variety of wrongs that are new, because the conditions from which they spring, or which give occasion for them, are new. Intellectual and material progress in various ways begets a complexity of business and social relations, and this adds perpetually to the difficulties of legal administration, and multiplies with no little rapidity the occasions for an adjudication upon disputed or doubtful rights. And it renders necessary an infinity of legislation in order to adjust and harmonize the new conditions with what remains of the old.

Classification of Wrongs. It is customary in the law to arrange the wrongs for which individuals may demand legal redress into two classes: the first embracing those which consist in a mere breach of contract, and the second those which arise independent of contract. The classification is not very accurate. Many cases exist where the complaining party may, on the same state of facts, at his option, count upon a breach of contract as his grievance, or complain of a wrong in a manner that puts the contract out of view. Imperfect as it is, however, the classification has been found sufficient for judicial purposes; and where forms of action have been abolished by statute the old distinctions are still kept in view in giving redress. And while thus the common law clas-

sified wrongs, it appropriated the generic term to one class of wrongs only. Breaches of contract were mere failures to perform agreements, and the actions for redress in the courts of law were actions on contracts, or actions *ex contractu*. Other acts or omissions giving rise to a suit at law were called specifically wrongs *or *torts*, and the actions by which redress was [*3] to be obtained were called actions for torts or actions *ex delicto*.¹

It is of the cases designated torts that we propose to treat. Where wrongs are mentioned it will be understood that breaches of contract are excluded, except as otherwise indicated.

Moral and Legal Wrong. An act or omission may be wrong in morals, or it may be wrong in law. It is scarcely necessary to say that the two things are not interchangeable. No government has undertaken to give redress whenever an act was found to be

1—The English Common Law Procedure Act of 1852 defines a tort as "a wrong independent of contract;" which is perhaps as good a definition as can be given, though even this may require explanation, since in many cases a tort only arises in consequence of the disregard of contract relations. Addison (on Torts, p. 1), gives no definition, only quoting from BAYLEY, J., in *Rex v. Pagram Commissioners*, 8 B & C 362, that to constitute a tort two things must concur, actual or legal damage to the plaintiff and a wrongful act committed by the defendant; but this is no more than saying that there must be damage as well as wrong to constitute a tort; and beyond that it might be misleading, since the want of an act—in other words, blamable neglect—is often the very thing in which a tort consists. Mr. Chitty speaks of personal actions in form *ex delicto* as being those "principally for

the redress of wrongs unconnected with contract;" which is true enough, though, as we have said, torts, in large classes of cases, only arise in consequence of a disregard of duty in relations which have been formed by express or implied contract. "We have been unable," says FINCH, J., "to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto*, there exists what has been termed a border land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other and become so nearly coincident as to make their practical separation somewhat difficult." . . . After noting cases where the same state of facts admits of an action either in tort or contract, he proceeds: "In such cases the tort is dependent upon, while at the same time independent of the contract; for if the lat-

wrong, judged by the standard of strict morality; nor is it likely that any government ever will.² Of the reasons that would preclude such an attempt, or render it futile if made, it will be sufficient here to mention the following:

Any standard by which the law can undertake to compel the people to regulate their conduct must be one generally and spontaneously accepted, so that their approving judgment shall [*4] accompany *the endeavor to enforce conformity. It must not be one that a majority of the people do not habitually observe, because if the majority of the people are law breakers, it is obvious that only some extraneous power could ever enforce the law. And if a perfect standard were agreed upon, it must have judges and other administrators of the law so perfectly constituted in their mental and moral natures, and so perfectly trained and disciplined, as to be capable at all times of perceiving its application and of applying it, and so entirely in harmony with it as habitually to be disposed to do so. The mere suggestion of these requirements is sufficient to make clear to the mind the impossibility of making moral wrong the test of legal wrong. It follows that there must of necessity be a legal standard of right and wrong; one that will be generally accepted, and one that the people in general will consent, under penalties, to conform to. Nor is it possible that this standard should be established otherwise than by positive human law; for human law alone could constitute the authoritative expression of assent which would be evidence of agreement upon it. When, therefore, the law of the land undertakes to declare and protect rights, and establishes a standard of conduct for the purpose, the acts or omissions which disturb or impede the enjoyment of such rights may be treated as legal wrongs or torts, but none others can be.

But while it is true that many things wrong in morals may not ter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract." *Rich v. New York, etc., R. R. Co.*, 87 N. Y. 382. For discussion of torts growing out of contract relations, see p. *90, *infra*.

2—*Birch v. Amory Mfg. Co.*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163. It is not appointed to human tribunals to sit in judgment upon mere moral delinquencies or abstract wrongs affecting only the conscience. *Mahoney v. Whyte*, 49 Ill. App. 97.

be wrong in law, it is equally true that some things which constitute wrongs in law may not be wrongs in morals. This remark is made without any purpose to broach a controversy concerning the moral obligation of every citizen to obey all the laws of his country; since taking this for granted, the observation is still accurate. It has already been stated that acts or omissions may constitute wrongs in law where the purpose to disobey the law or to disregard any of its requirements has been wholly wanting. Every case in which parties have acted under an honest mistake regarding their rights may be of this character; and possibly it might be safe to say that in a majority of cases in which persons have been adjudged guilty of legal wrongs, no intent to disobey the law has existed;³ the wrong is one of accident, mistake, or *negligence, or it is due to some other cause which [*5] is consistent with the absence of evil purpose. "Neither an intention to injure the plaintiff, nor an intention to do the act which caused the injury, is essential. It is sufficient if the de-

3—If a person unlawfully injures another, he must pay the damages without regard to the intention with which the act was done. *Amick v. O'Hara*, 6 Blackf. 258; *Bruch v. Carter*, 32 N. J., 554; *Cate v. Cate*, 44 N. H., 211; *Dexter v. Cole*, 6 Wis. 319; *Gibbs v. Chase*, 10 Mass. 128; *Miller v. Baker*, 1 Met. 27; *Cubit v. O'Dett*, 51 Mich. 347; *Hazelton v. Week*, 49 Wis. 661, 35 Am. Rep. 796; *Tobin v. Deal*, 60 Wis. 87, 60 Am. Dec. 345; *Coffman v. Burkhalter*, 98 Ill. App. 304; *Ward v. Rapp*, 79 Mich. 469, 44 N. W. 934; *Waverly T. & I. Co. v. St. Louis Cooperation Co.*, 112 Mo. 383, 20 S. W. 566; *Donahue v. Shippee*, 15 R. I. 453, 8 Atl. 541. The intentional throwing, in sport, at another of a piece of mortar without intent to injure, is actionable if damage ensues to a third person. *Peterson v. Haffner*, 59 Ind. 130, 26

Am. Rep. 81. To same effect: *Reynolds v. Pierson*, 29 Ind. App. 273, 64 N. E. 484. Intention is immaterial to the inquiry whether an act is a nuisance. *Bonnell v. Smith*, 53 Ia. 281. On the other hand, if the act is not unlawful, the intent with which it is done, does not in general constitute a tort. *Estey v. Smith*, 45 Mich. 402. *Post*, ch. xxii. A rightful act negligently done is a tort. *Howe v. Young*, 16 Ind. 312; *Baltimore, etc., R. R. Co. v. Reaney*, 42 Md. 117. So if the act, unlawful in itself, is lawful as to the defendant. *Knott v. Wagner*, 16 Lea, 481. Good faith does not excuse negligence. *Lincoln v. Buckmaster*, 32 Vt. 652; *Tally v. Ayres*, 3 Sneed, 677. So if a druggist negligently delivers a harmful drug when a harmless one is asked for. *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728; *Davis v. Guarnieri*, 45

fendant does a positive act from which the plaintiff suffers an immediate injury.”⁴

Defining Rights. Every government must concern itself with the definition of rights and the providing of adequate security for their enjoyment. If a government is properly and justly administered, this will be its chief business; and this in its true sense constitutes civil liberty. The term natural liberty is sometimes made use of by writers on law and on politics in a sense implying that freedom from restraint which exists before any government has imposed its limitations. But in no proper or valuable sense has any such liberty existed or been possible. If it be said that every man, considered as an individual without regard to family or political relations, has a natural liberty to do what he pleases, subject only to the laws of nature,⁵ and, as Bentham expresses it, “to make use of everything,”⁶ then, as the liberty of one would only be the same unrestricted liberty which was the right of every other, the liberty would be one of perpetual warfare and contention, as the wants, desires, or appetites came in conflict, and every man would have equal right to take, or hold what his courage, strength, or cunning could secure [*6] to *him, but no available right to more. A natural liberty of this sort is obviously inconsistent with any valuable right whatsoever, and would of itself, as other writers have shown, be sufficient to demonstrate the necessity of government for the imposition of restraints and the establishment of a common arbiter or judge between individuals.⁷ And where govern-

Ohio St. 470, 15 N. E. Rep. 350. A trespass is often a mistaken assertion of a right in which the party has the utmost confidence. Though a trespasser is misled by a *bona fide* mistake as to his title, or takes every precaution to keep within his own lines, he is liable. *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403.

4—*Judd v. Ballard*, 66 Vt. 668, 672, 30 Atl. 96. The intent with which a wrongful act is done is of

little consequence unless it is malicious. *Gibbons v. Farwell*, 63 Mich. 344, 29 N. W. 855.

5—1 Bl. Com. 125.

6—Constitutional Code, V. 1 c. 3 s. 6. Austin justly says that, “Strictly speaking, there are no rights but those which are the creatures of law.” Austin, *Jurisprudence*, Lec. XII.

7—*Burlamaqui*, Nat. and Pol Law. Vol. 2, pt. 1, c. 8.

ments are established, the rights of which the law can take notice, can be those only which come from and are defined by the law itself. A legal right is something which the law secures to its possessor by requiring others to observe it, and to abstain from its violation. Only the law can prevent such interference by others as would deprive it of all the qualities of an individual possession. Individual rights, liberty, and property are born of legal restraints; by means of these every man may be protected within the prescribed limits; when without them, possessions must be obtained and defended by cunning or force. In the domain of speculation or morals a right may be whatever ought to be respected; but in law that only is a right which can be defended before legal tribunals. Protection in rights gives to a man his liberty, but the same protection sets bounds to and constitutes a limitation upon the liberty of every other person, and the maximum of benefit of which government is capable is attained when individual rights are clearly and accurately defined by impartial laws, which impose on no one any greater restraint than is found essential for securing equivalent rights to all others, and which furnish for the rights of all an adequate and an equal protection.⁸

***Public Wrongs.** Certain acts or omissions are taken [*7] notice of by the law as constituting wrongs to the State. These may consist in something which tends to disturb, embarrass,

8—Much is said by some writers concerning natural rights and natural liberty, and of the duty of the government, instead of *creating*, to *recognize* those which come from nature. As if nature had indicated any clear line which the human intellect and conscience would infallibly recognize, on either side of which might be placed the acts permitted and the acts prohibited, according as the one or the other was by nature justified or condemned. As if every human act or omission had a moral quality of which the government could take notice, and by which it might judge the act or omission. Indeed, some have even gone so far as to assume that in a world where the moral law was accepted fully and obeyed implicitly, no law would be necessary, because every individual would at once perceive and do that which was right, and thus put legal compulsion out of the question. But if the most conscientious persons in any state of existence were compelled to support themselves by their industry; if they had occasion to buy and sell,

or subvert the government, or to hinder the administration of the laws, or they may consist in acts or neglects which prejudice individuals, but indirectly and perceptibly affect the public also. These cases will be referred to in a subsequent chapter.⁹

The law also permits certain acts to be punished as wrongs to municipal corporations, or to the several political divisions of the State, because they have a tendency to disturb their peace and good order, or to embarrass or obstruct in some manner the local government, though to the people of the State at large they may be matters of indifference. These wrongs will consist mainly in breaches of municipal by-laws, or of local police regulations, and they may or may not be wrongs to individuals.

The two classes of wrongs just enumerated constitute what are known as public wrongs, and they will be visited with some species of penalty. While the leading purpose in imposing the penalty will be security for the future, incidentally the reformation of the offender may also be had in view. In inferior offenses the idea of compensation is sometimes present, and even in case of offenses of a high grade, pecuniary penalties are often imposed to cover in whole or in part the cost of bringing the wrong-doer to justice. But compensation in the case of public wrongs is usually a subordinate purpose, while in the case of private wrongs it is the substantial purpose of the law.

Wrongs essentially Public sometimes Private Wrongs also.

When the act or neglect which constitutes a public wrong is specially and peculiarly injurious to an individual, and obstructs

and to find their transactions affected by accident and mistake; if occasionally they encountered questions of defective title, or questions of commercial law, where one of two innocent persons must inevitably suffer; if bankruptcies must occur, the consequences of which must fall upon third persons, whose dealings with the bankrupt had been interwoven with dealings between themselves; in short, if they lived

in a world which, except in the moral qualities of the people, corresponded to the present, they would be likely soon to discover that the rule of morality is very far from being adequate to the adjustment of a large proportion of all the controversies in which conscientious men, in the absence of law, would find themselves involved.

9—See Chap. III.

him in the enjoyment of some right which the law has undertaken to assure, the offender may be subject to a double liability; he may be punished by the State, and he may also be compelled *to remunerate the individual. These cases we pass [*8] for the present, with only the general remark, that the private injury must be of a pecuniary nature; something different from that which is inflicted upon or suffered by the public at large. One man cannot have his private action against a murderer on a showing that the murder was more shocking to him than to others, or touched him peculiarly in his affections. These injuries are general in kind; they are only peculiar in degree.

Wrongs to Aggregate Bodies. A wrong may consist in depriving a number of persons associated together for their own purposes of some legal right. In such a case there is either a joint wrong to all, or there is an individual wrong to each of the associates. The wrong must be severable, and constitute individual wrongs, if it only deprives each associate of a right personal to himself, though exactly like the rights of which his associates are deprived at the same time, and by the same act or neglect. Such would be the case if the several members of a voluntary organization were wrongfully prevented from meeting. The right of each is personal to himself, and therefore, though there is a common wrong, there is no joint wrong.¹⁰

On the other hand, an injury to the property owned in com-

10—2 Saunders, 116a, note 2. The question in each case is, whether the particular injury was or was not a joint injury. It may have been exactly alike to each, and it may have been accomplished by one act, and yet be no joint injury; as where one says to two persons, "You have murdered J. S.;" this is a several, not a joint, slander, the reputation of each being assailed. *Smith v. Cooker*, Cro. Car. 513. But the injury may be joint, though it consists in de-

priving parties of some right, the profit of which would be several; as where an unauthorized person undertook the business of dipping in the medicinal waters at Tunbridge Wells, thereby rendering less valuable and diminishing the probable gains of all those who were authorized. *Weller v. Baker*, 2 Wilson, 414. Or where a public officer threatens to misappropriate corporate funds, thus increasing the burden of all taxpayers.

mon by the associates would be an injury to all, and all should unite in seeking redress.¹¹ This might lead to great difficulties when the associates were numerous, and to avoid these, one person is sometimes made the owner of the property, or given legal control over it in trust for the others, and is thus enabled in his fiduciary capacity to protect the rights of all. The importance [*9] of this is perceived in the rule of law which requires the parties complainant and respondent in legal proceedings to be named in the pleadings, and which refuses to know voluntary associations, except through the individualism of their members.

The voluntary society cannot, as such, sue or be sued; in legal phrase, it is not known to the law. But the inconveniences which may flow from this rule are, to a large extent, obviated by the permission of the sovereign authority to organize the voluntary society into an artificial person, which is called a corporation, and into which, for legal purposes, the individual identity is merged. This artificial person, like any other, has its name, and is capable of wronging and being wronged, and of suing and being sued. It has its civil rights, and it is a part of the civil right of each corporator that the law is to protect him, and to protect the association in the liberties and privileges which the law permits the corporation to assume and exercise.

Civil Liberty. From what has been said we may approach an understanding of what the condition is which constitutes civil liberty. In making use of this term it is proper to state that writers of acknowledged authority employ it in very different senses. Thus the leading commentator on American law defines it as "consisting in being protected and governed by laws made or assented to by the representatives of the people, and conducive

11—Austin v. Hall, 13 Johns. 289; members may sue in behalf of Merrill v. Berkshire, 11 Pick. 269. themselves and all other members, In Liederkrantz Singing Society v. or that suit may be brought in Germania Turn-Verein, 163 Pa. St. the name of the association by 265, 29 Atl. 918, 43 Atl. 798, it is certain of the members, but the said that, in case of large unin- former is declared to be the ap- corporated associations, certain proved practice.

to the general welfare.’¹² This excludes the idea of civil liberty, except where representative institutions prevail; and in *this particular it differs radically from the definition of [*10] Justice BLACKSTONE.¹³ It also makes civil liberty and political liberty synonymous, in this particular agreeing with that of Blackstone. Mr. Austin says that “political or civil liberty is the liberty from legal obligation which is left or granted by a sovereign government to any of its own subjects.”¹⁴ Mr. Lieber says civil liberty “consists in guarantees—and corresponding checks—of those rights which experience has proved to be most exposed to interference, and which man holds dearest and most important.”¹⁵ Without giving the definition of others, we prefer to distinguish civil from political liberty, defining the former as that condition in which rights are established and protected by means of such limitations and restraints upon the action of individual members of the political society as are needed to prevent

12—2 Kent Com. p. 1. In the French Constitution of 1793 there was the following specification of rights:

“1. The object of society is the general welfare. Government is understood to insure to man the free use of his natural and inalienable rights.

“2. These rights are equality, liberty, security, property.

“3. All men are equal by nature and before the law.

“4. Law is the free and solemn proclamation of the general will; it is the same for all, be it protective or penal; it can command only what is just and beneficial to society, and prohibit only what is injurious to the same.

“6. Freedom is the power by which man can do what does not interfere with the rights of another; its basis is nature; its standard is justice; its protection is law; its moral boundary is the

maxim, “Do not unto others what you do not wish they should do unto you.”

“8. Security rests on the protection given by society to each of its members for the preservation of his person, his rights and his property.

“16. The right of property is that by which every citizen can enjoy his goods and his income, the fruits of his labor and industry, and his right to dispose of them at his pleasure.”

13—1 Bl. Com. 125.

14—Austin, Jurisprudence, Lec. VI. and XLVII.

15—Lieber, Civ. Lib. and Self-Gov., Ch. III. Liberty includes a man’s “right to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade and occupation.” *In re Jacobs*, 98 N. Y. 98.

what would be injurious to other individuals or prejudicial to the general welfare; and defining political liberty as consisting in an effectual participation of the people in the making of the laws. The former may exist when the latter is absent; but since it would be perpetually liable to be broken in upon and set aside by the arbitrary action of rulers, it is manifest that it could have no secure existence except under a government whose powers were exercised under very effectual constitutional restraints, such as can exist only where the people govern through their representatives. Civil liberty must begin with law; and in order that it may have firm root, it is essential that the law-maker himself shall be under effectual restraints of the law. Without this it could not be very important how just were the purposes of the ruler. A magistrate with despotic powers who goes about administering a rude justice in special cases according as his individual sense of right and wrong inspires him, may possibly be applauded for his wisdom, his justice or his clemency; but his decisions can settle no principles which his subjects can understand and appreciate, and by which they may afterward regulate their actions. Security can only come from fixed rules which the people, as they become familiar with them, will habitually respect [*11] and observe; it cannot *come from judgments which are directed by the individual will alone, every one of which must stand by itself on its own reasons, must be submitted to without question, and will be attributed to good motives or bad, to wisdom or caprice, to judgment or passion, according to the views which are held by the people or by individuals concerning the ruler who gives it. But where rights are defined and regulated by durable laws, respect and obedience become habitual, and there is at length a spontaneous conformity of action thereto which deprives the numerous restraints of the law of all seeming hardship that might have been felt originally. The restraints come to be understood and appreciated in their true character as being severally the representatives of rights secured and protected, and the feeling they give is one of security rather than of restiveness and oppression. The restraints and the liberty of the people will progress together, so that the restraints will be most numerous

where rights are most fully recognized and most perfectly protected; and if the laws are impartial, even peculiar privileges which fall to the possession of the few will be cheerfully acquiesced in by the many, because they will be granted on a consideration of what is best for the whole political society, so that though the few may receive the direct benefit, all others will be supposed to receive incidental benefits sufficient to justify the grant of such privileges.¹⁶

Growth of Rights. Some reference to the progressive growth of rights seems required by the subject. Historically, this is always obscure and can only imperfectly be traced. In most countries rights, in their origin, are traditionary rather than statutory. With us, as will be more fully shown hereafter, they have always rested in the main upon what we call the common law, and upon principles which, by a liberal use of fiction, we assume have always constituted a part of this common law. A common law was unquestionably in existence during the period of the Saxon kings, and it supplied the rule of right and of property under the arbitrary Normans to an extent sufficient to continue to it that attachment of the people which had been cherished before the Conquest. The Great Charter was a guaranty *of its [*12] principles rather than a new grant. It was a useful code in barbarous and despotic periods, and it has not been any the less so in enlightened periods and under free governments. But in order that it may be continuously useful the progressive changes must be great and numerous, so great and so numerous that it could only be by the most enlarged intendment that the law of to-day could be recognized as the common law of even the time of Lord Coke. In fact, its principles now depend very largely on a species of judicial legislation which from time to time, as new conditions were found to exist, has endeavored to fit and conform the old law to them.

In making use of this term, judicial legislation, we encounter

16—1 Bl. Com. 467; A. & A. on 91; Curries' Admr. v. Mutual As-
Corp., § 13; Aldridge v. Railroad surance Society, 4 Hen. & M. 347;
Co., 2 Stew. & Port. 199; Dungh- Dartmouth College v. Woodward,
drill v. Ala. Life Ins. Co., 31 Ala. 4 Wheat. 518, 637.

prejudices which have for their foundation much apparent reason. The term seems in itself a contradiction; judicial action is one thing, legislation is another, and by the theory and practice of our government we seek to make them stand distinctly apart, and require that their exercise shall be in different hands. Legislation by the judiciary must consequently consist in an invasion of the province of another department of the government, and is properly denominated usurpation. But there is another sense in which judicial legislation may be understood, in which it seems to be a necessary condition of any steady improvement in the law, and, therefore, deserving of no censure. A few suggestions by way of indicating what this is will be all we care at this time to make, and these will relate to the method by which the common law of any country is usually developed.

It is impossible to conceive of any condition of organized society, even the most primitive, in which some rights will not be recognized; the right, for instance, of every man to his life, to the implements by the aid of which he secures the means of sustaining life, to the results of the chase, or of his rude agriculture, and to form family relations. But between those possessing such rights there must necessarily be some common arbiter of controversies, and every people will select this common arbiter with some reference to a supposed superior wisdom or superior experience, such as will enable him to draw clear and accurate conclusions where others would hesitate, or perhaps find themselves wholly at fault. It would be the business of such an arbiter to determine the application of the law to the facts of any case

brought before him, and he must either find an existing [*13] rule *which governs the case, or he must withhold decision until the competent authority can legislate and establish one. The latter course, in many cases, would be equivalent to remanding the parties, as regards the pending controversy, to a condition like that preceding established government; a condition in which violence would be invited, because no peaceful remedy was attainable. It would consequently be wholly inadmissible. The alternative would be the acceptance of the principle that the existing law governs all cases, and that the ruling principle for

any existing controversy will be found, if sought for. This is substantially what is done by the English common law; and with this principle accepted, rights have grown up under judicial regulation, and through judicial definition, much more than under legislation properly so designated. The code of to-day is therefore to be traced rather in the spirit of judicial decisions than in the letter of the statute. The process of growth has been something like the following: Every principle declared by a court in giving judgment is supposed to be a principle more or less general in its application, and which is applied under the facts of the case, because, in the opinion of the court, the facts bring the case within the principle. The case is not the measure of the principle; it does not limit and confine it within the exact facts, but it furnishes an illustration of the principle, which, perhaps, might still have been applied, had some of the facts been different. Thus, one by one, important principles become recognized, through adjudications which illustrate them, and which constitute authoritative evidence of what the law is when other cases shall arise. But cases are seldom exactly alike in their facts; they are, on the contrary, infinite in their diversities; and as numerous controversies on differing facts are found to be within the reach of the same general principle, the principle seems to grow and expand, and does actually become more comprehensive, though so steadily and insensibly under legitimate judicial treatment that for the time the expansion passes unobserved. But new and peculiar cases must also arise from time to time, for which the courts must find the governing principle, and these may either be referred to some principle previously declared, or to some one which now, for the first time, there is occasion to apply. But a principle newly applied is not supposed to be a new principle; on the contrary, it is assumed *that from time immemorial is has constituted a part of the common law of the land, [*14] and that it has only not been applied before, because no occasion has arisen for its application. This assumption is the very ground work and justification for its being applied at all; because the creation of new rules of law, by whatsoever authority, can be nothing else than legislation; and the principle now an-

nounced for the first time must always be so far in harmony with the great body of the law that it may naturally be taken and deemed to be a component part of it, as the decision assumes it to be. Thus a species of judicial legislation, proper and legitimate in itself, because it is absolutely essential to a systematic adjudication of rights, goes on regularly, and without interruption; and up to the present time, in England and America, it has been not only more efficient, but also more useful, in establishing the rules by which private rights are to be determined, and in giving remedies for their violation, than has been the regular and formal enactment of laws. If we consider in detail any one branch of the law, that, for instance, of wrongs by negligence, the examination would render this truth very manifest. Statutes have provided for some new cases; they have changed the common law in some particulars in which, under new circumstances, a change which was not within the compass of legitimate judicial action seemed essential; they have given a private remedy in some cases where the common law gives none; as, for instance, where death has resulted from a wrongful act or default; and they have taken away remedies in some cases as, for instance, that which the common law gave against the owner of a house for a fire accidentally originating in it.¹⁷ But even in these cases the statutes have been left for explanation to the rules of the common law; they have given rights which can only be understood in the light of common law principles. In some cases, also, the statutory law has forbidden the doing of certain acts, and the common law, as administered by the courts, has supplemented this action by giving remedies to private parties who are injured by a disregard of the statutory prohibition. In these cases the statute law may be said to lean upon and receive aid from the common [*15] law; but in the vast majority of all the *cases in which remedies are given for wrongs committed, the judge looks only to the common law, and must administer justice on principles which have grown up irrespective of statutes, and which, no mat-

17—*Tuberville v. Stamp*, 1 Co. Filliter *v. Phippard*, 11 Q. B. 347. myn R. 32; S. C. 2 Salk. 647;

ter how recently announced, are assumed to have existed from time immemorial.

The common law is generally said to consist in the established usages of the people, by which their respective rights are recognized and limited, and to which they are expected to conform in their dealings.¹⁸ This definition is quite sufficient for all ordinary purposes; but if considered critically, it is inaccurate in this: That it fails to comprehend those cases which are disposed of under the common law, in respect to which there can be no established usage, because the cases themselves are entirely new. The usage in such a case must come after the decision has established the principle, and it must have followed the decision as a result, instead of preceding it as a cause or reason. With these cases in view, it will be evident that the common law is something more than a body of usages; it is that, indeed, but it also embraces the principles which underlie the usages, or which so harmonize with them that the courts are justified in accepting them as the basis for judicial action, and as forming with the usages a consistent body of law. Thus a very considerable proportion of the common law has had its real origin in judicial action, which has accepted many things for law, and rejected many others, and by a sifting process has made the law what we find it now. The growth of the law under this treatment has been so moderate, so steady, and so beneficent as to afford no small justification for the hearty praise that so often has been bestowed upon it. It has been modified and expanded under the decisions, but the changes effected by or through the influence of any particular decision have been such only as it was believed did not disturb the general harmony of the law, and such as could be justified as being rather a new illustration of the law as it was, than an alteration of it. In this steady and almost imperceptible change must be found the chief advantages of a judicial development of the law over a statutory development; the one can work no great or sudden changes; the

18—Cooley, *Const. Lim.* 22-24, *wealth v. Churchill*, 2 Met. (Ky.) and cases cited; *Le Barron v. Le Barron*, 35 Vt. 365; *Common-*

other can, and frequently does, make such as are not only violent, but premature. A large share of *the value of law [*16] consists in the habitual reception and the spontaneous obedience which the people are expected to give to it, and which they will give when they have become accustomed to and understand its obligations. The people then may be said to be their own policemen; they habitually restrain their actions within the limits of the law, instead of waiting the compulsion of legal process. A violent change must break up, for the time being, this spontaneous observance, and some degree of embarrassment is always to be anticipated before that which is new and strange becomes habitually accepted, and its advantages appreciated, and before that which remains of the old is adjusted to it.¹⁹

For this reason an imperfect law let alone may be much more conducive to the peace of society and the happiness of the people than a better law often tampered with. But there are always some particulars in which improvement by judicial decisions is impossible, and where legislation alone is adequate to the purpose. An illustration may be given of a case which has already been made use of on another point.

No action would lie at the common law for causing the death of a human being. This was as thoroughly settled by decisions as it was possible for any point to be, and the concurrence of authority was unanimous. When, therefore, it was concluded that public policy demanded the giving a right of action in these cases, a new law was obviously essential. There was no old principle that could adapt itself to such a remedy, for the established principle was distinctly adverse to it. Near a century ago an

19—These cases illustrate the principle in question and show how the principles of the common law will be moulded and applied to meet new cases and new conditions. *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829; *Mentzer v. Western Union Tel. Co.*, 93 Ia. 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L.

R. A. 72; *Kerner v. McDonald*, 60 Neb. 663, 84 N. W. 92, 83 Am. St. Rep. 550; *Johnson v. Girdwood*, 7 Misc. 651, 28 N. Y. S. 151; *Pope v. Pollock*, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255; *Commonwealth v. Hess*, 148 Pa. St. 98, 23 Atl. 977, 33 Am. St. Rep. 810.

English judge pointed out the distinction between the cases in which legislative interference was essential and those in which it was not, in the following language: "Where cases are new in their *principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago; if it was not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them."²⁰

It must be conceded that this is somewhat indefinite, and that *the field it allows for the exercise of judicial discre- [*17] tion in determining what principles are and what are not recognized in the law, and what cases fall within those that are recognized, is a very broad one. It is often exercised by looking beyond the limits of the common law and culling from the civil law the principles there discovered which may supplement and improve where the common law is discovered to be deficient. An actual adjudication will illustrate this: The owner of logs, by a sudden and very great freshet, had them carried away upon the land of a proprietor below, where they cause considerable injury as they float about. For this injury the owner of the logs is not responsible, because it happened without his fault. The law does not impose on any one the obligation to compensate for accidental injuries. But the logs are now upon the lands of another and cannot be reclaimed without a trespass. The owner of the logs must, therefore, lose them, or he must reclaim them with a further injury to the owner of the land. What is the solution of this difficulty, and how, under such circumstances shall the rights of the parties be adjusted? The civil law affords a solution. By that, if the owner of the logs claimed exemption from responsibility for the injury occasioned by them, he must abandon them to the party they had injured. If he reclaimed them he

must pay for the injury. The option was with him, and the condition was perfectly reasonable. Now the common law judge finds this principle applicable to a case before him, and he also finds that it may readily be fitted in and accommodated to the common law system; that, in fact, it seems to belong there, and he therefore accepts it.²¹ It decides the particular case and it becomes a precedent.

The view which is quite the opposite of this, and of which Mr. Bentham was a conspicuous exponent, denounces the judicial development of the law as usurpation, and demands legislative codification as the legitimate substitute. "Of the whole body of actual law," this writer says, "one pre-eminently remarkable division, derived from a correspondently remarkable source and pervading the whole mass, still remains. It is that by which it is distinguished into two branches, the arrangements of one of which are arrangements that have really been made—made by hands universally acknowledged as duly authorized and *com-
[*18] petent to the making of such arrangements, viz., the hands of a legislator general, or set of legislators general, or their respective subordinates. This branch of the law may stand distinguished from that which is correspondent and opposite to it, by the name of *real* law, really existing law, legislator made law; under the English government it stands already distinguished by the name of *statute* law, as also by the uncharacteristic, indiscriminative and in so far improper appellation of written law. The arrangements supposed to be made by the other branch, in so far as they are arrangements of a general nature, applying not only to individuals assignable, but to the community at large, or to individuals not individuals assignable, may stand distinguished by the appellations of unreal, not really existing, imaginary, fictitious, spurious, judge-made law; under the English government the division actually distinguished by the unexpressive, uncharacteristic and inappropriate names of *common* and *unwritten* law.

"Of the manner in which this wretched substitute to real and genuine law is formed, take this description: In the course of a

21—Sheldon v. Sherman, 42 N. Y. 481, 1 Am. Rep. 569.

suit in which application is made of the rule of action thus composed, the judge on each occasion *pretends* to find ready-made, and by competent authority, endowed with the force of law (and at the same time universally known to be so in existence and so in force), a proposition of a general aspect adapted to the purpose of affording sufficient authority and warrant for the particular decision or order, which on that individual occasion he accordingly pronounces and delivers.

“Partly from the consideration of the general proposition so framed, as above, by this or that judge, or set of judges; partly from the consideration of the individual instruments or documents expressive of such individual decision or order, as above; partly from the consideration of such discourses as have been or are supposed to have been uttered, whether by the judges or the advocates on one or both sides, a class of lawyers have, under the names of general treaties, or reports of particular cases, concurred in the composition of an immense chaos, the whole of it *written*, and a vast portion of it printed and published, constituting an ever increasing body of that which forms the matter which passes under the denomination of unwritten law.”²²

*Such were the views of Mr. Bentham. To understand [*19] the working of the opposite system of codification, which he favored, it is necessary to suppose the whole body of law reduced to writing and adopted by legislation as a complete substitute for the common or unwritten law as now understood. Such a code could embrace little more than general principles only; it could not anticipate the infinite variety of cases as they arise on their facts; but every actual controversy, as it is presented to the judges for decision, must be compared by him with those general principles; he must find that it is or is not embraced within some one of them, and must hold according to this finding that there is or is not a remedy. If his conclusions are accepted as guides in future cases, books of reports, and at length, commentaries will be found convenient and will naturally be published; if they are not accepted as guides, every judge will con-

strue the code according to the inclination of his own mind; one judge strictly, lest he be chargeable with judge-made law; another liberally, lest he fail in some cases to give the redress which justice demands, until the statute which was intended to make all clear seems only to introduce an uncertainty as great as the minds of men are variant. As this state of things would be less endurable than the other, it would follow that the other would be preferred; the code would only become a starting point from which judicial development would necessarily begin, the courts being under the same necessity for finding in the code the governing principles of every case that before compelled them to find it in the common law, and, for the sake of instruction as well as of uniformity, being required to look to the decisions of their predecessors as some evidence of what the general declarations of the code intend, and as some guide in the future applications to new state of facts. Thus, without touching upon the point of the desirableness of a code, it is perceived that its enactment is not to dispense wholly with some of the supposed objections to the common law system, nor can it wholly preclude judge-made law.

For the judge must either find the code adequate to all controversies, or he must pause in doubtful cases until the legislature can declare the rule. But to lay down the rule retrospectively for existing controversies is not only in a very high degree objectionable and dangerous, but it is also a species of legislative [*20] judicial action, and, particularly when it is done with reference to special cases, is liable to all the objections which have led the people when framing their governments to forbid the legislature exercising judicial power. The judge could not assume that for the government of any particular controversy the law has absolutely no rule whatever; he must hold that it either gives a remedy, or it denies one in every conceivable case.

No Wrong Without a Remedy. Judicial development of the law is perceived in two forms: In the recognition of rights, and in giving a remedy for the invasion or deprivation of rights. In the first, usages and precedents will be consulted, and analogies made use of. A right cannot be recognized until the principle is found which supports it. But when the right is found,

the remedy must follow, of course. The maxim of law, that wherever there is a right there is a remedy, is a mere truism; for, as Lord HOLT has said, "it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."²³

The idea here conveyed is, that that only is a legal right which is capable of being legally defended; and that is no legal right, the enjoyment of which the law permits any one with impunity to hinder or prevent. It is a legal paradox to say that one has a legal right to something, and yet that to deprive him of it is not a legal wrong. When the law thus declines to interfere between the claimant and his disturber, and stands, as it were, neutral between them, it is manifest that, in respect to the matter involved, no claim to legal rights can be advanced. Thus, if the domestic animals of one man invade the unfenced premises of another, and the latter demands compensation from the owner, but finds that the statute denies it to him, the denial itself is conclusive *that the person damnified has no right to [*21] demand protection against such invasions.

The method of determining the question of remedy is well il-

- 23—*Ashby v. White*, *Ld. Raym.* 938; *S. C.* 1 *Smith Lead. Cases*, 105. See *Co. Lit.* 197 *b*; *Herring v. Finch*, *Lev.* 250; 3 *Bl. Com.* 123; *Johnstone v. Sutton*, 1 *T. R.* 493; *Lord Camden in Entrinck v. Carrington*, 19 *How. State Trials*, 1066; *Pasley v. Freeman*, 3 *T. R.* 63; *Hobson v. Todd*, 4 *T. R.* 71; *Millar v. Taylor*, *Burr.* 2344; *Braithwaite v. Skinner*, 5 *M. & W.* 313; *Marzetti v. Williams*, 1 *B. & Ad.* 415; *Hodsoll v. Stallebrass*, 11 *A. & E.* 301; *Clifton v. Hooper*, 6 *Q. B.* 468, 474; *Pickering v. James*, *L. R.* 8 *C. P.* 489; *Atkinson v. Waterworks Co.* *L. R.* 6 *Exch.* 404; *Jenkins v. Waldron*, 11 *Johns.* 120, 6 *Am. Dec.* 359; *Pastorious v. Fisher*, 1 *Rawle*, 27; *Snow v. Cowles*, 22 *N. H.* 296; *Woodman v. Tufts*, 9 *N. H.* 88; *Toothaker v. Winslow*, 61 *Me.* 123; *Lorman v. Benson*, 8 *Mich.* 18, 77 *Am. Dec.* 435; *Bass v. Emery*, 74 *Me.* 338; *Doremus v. Hennessey*, 176 *Ill.* 608, 52 *N. E.* 924, 54 *N. E.* 524, 68 *Am. St. Rep.* 203, 43 *L. R. A.* 797; *Haynes v. Nowlin*, 129 *Ind.* 581, 29 *N. E.* 389, 28 *Am. St. Rep.* 213; *Mentzer v. Western Union Tel. Co.*, 93 *Ia.* 752, 62 *N. W.* 1, 57 *Am. St. Rep.* 294, 28 *L. R. A.* 72; *Deitzman v. Mullin*, 108 *Ky.* 610, 57 *S. W.* 247, 94 *Am. St. Rep.* 390, 50 *L. R. A.* 808; *Walker v. Walker*, 63 *N. H.* 321, 56 *Am. Rep.* 514; *Pope v. Pollock*, 46 *Ohio St.* 367, 21 *N. E.* 356, 15 *Am. St. Rep.* 608, 4 *L. R. A.* 255.

illustrated by the leading case of *Ashby v. White*²⁴ just referred to. The facts were, that certain persons had been denied the right to vote for members of Parliament. They brought suit against the officer who excluded them. No such case had ever been adjudged, and there was no precedent for the suit. But in the opinion of Lord HOLT, a precedent was not important. The material question was, Had they a right to vote? This was to be determined by the statute prescribing the qualifications of voters, and by the facts which did or did not bring these parties within the statute. When the facts were found in their favor, the legal conclusion must follow. Having a right, the remedy was of course. It might have been different had the officer been made the judge, whether the proper qualifications existed; for then his judgment that the right existed would have been a condition precedent.

It is no answer to an action that the like was never heard of before, because every form of action when brought for the first time must have been without a precedent.²⁵ "It is the peculiar merit of the common law that its principles are so flexible and expansive as to comprehend any new wrong that may be developed by the inexhaustible resources of human depravity."²⁶ "Wherever there is a valuable right and an injury to it, with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will make the most complete reparation."²⁷

24—*Ld. Raymond*, 938, 1 *Smith Lead Cas.* 105.

25—*Kujek v. Goldman*, 150 N. Y. 176, 44 N. E. 773, 55 *Am. St. Rep.* 670, 34 *L. R. A.* 156; *Johnson v. Girdwood*, 7 *Misc.* 651, 28 N. Y. S. 151; *Hundley v. Louisville & N. R. R. Co.*, 105 Ky. 162, 48 S. W. 429, 88 *Am. St. Rep.* 298; *Holleman v. Harward*, 119 N. C. 150, 25 S. E. 972, 56 *Am. St. Rep.* 672, 34 *L. R. A.* 803.

26—*Johnson v. Girdwood*, 7 *Misc.* 651, 28 N. Y. S. 151.

27—*Foot v. Card*, 58 *Conn.* 1, 18

Atl. 1027, 18 *Am. St. Rep.* 258, 6 *L. R. A.* 829. In *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 193, 194, 69 *L. R. A.* 101, the court says: "The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the court to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the lawmaking power; but such absence, even for all time, is not conclusive of the question as to the

To what is here said there are some apparent exceptions. Thus statutes, in many cases, forbid, under penalties payable to the State, the doing of certain acts that might be injurious to individuals, or, under like penalties, require certain acts to be done, the doing of which will be beneficial to individuals. In these cases, if it is manifest from the statute that the penalty is the only injurious consequence that is to be incurred by a violation of the law, it may be said that the individual has a right, and yet that the law affords him no remedy for its infringement. But in a strict legal sense, the statute in such cases is to be regarded as prescribing duties on public grounds only, and the party who suffers from a failure to observe them only chances to be the individual upon whom fall the consequences of a wrong done to the public.

It may be said, also, that in the election case, if the officer had been made final judge of the facts and had decided erroneously, the voter would equally have been wronged, and yet no remedy have been open to him. But in contemplation of law the decision of the tribunal appointed to decide finally upon any question must be conclusively deemed correct. If that tribunal finds that no right exists, then the party is not wronged by a right being *denied him. Order and stability in government require that in all civil proceedings this conclusion shall be absolute.

Classification of Remedies. Legal remedies are either preventive or compensatory. Every remedy is, in a certain sense, preventive, because it threatens certain undesirable consequences

existence of the right. The novelty of the complaint is no objection when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case 'although there be no precedent, the common law will judge according to the law of nature and the public good.' Where the case is new in principle, the courts have no authority to give a rem-

edy, no matter how great the grievance; but where the case is only new in instance, and the sole question is on the application of a recognized principle to a new case, 'it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.'"

to those who violate the rights of others. The person inclined to invade his neighbor's premises has over him the threat of the law that he shall be made to pay all damages, as well as the costs of litigation, if he shall venture to trespass. If he proposes to defame his neighbor, the threat is that he shall pay not actual damages merely, but damages specially assessed in proportion to the aggravation of the case. The principal, however, in all cases, is compensation for an injury done, and exemplary damages are only given in those cases in which the injury, for some reason, is one of special aggravation. In some cases the law permits a mandatory writ to restrain the commission of some threatened wrong; but the general employment of such a writ would lead to abuses which would be intolerable. At the best, preventive remedies are dangerous, because they must to a considerable extent be summary, and be awarded without that full and careful inquiry into the merits which precedes the final judgment. Besides, they must be awarded upon a supposed wrongful intent, and the inquiry into an unexecuted intent is usually among the most unsatisfactory things in legal procedure.

The danger from the employment of preventive remedies is, that though given for the protection of rights and liberties they offer a constant invitation to the usurpation of right and the overthrow of liberties. It is better and safer to assume that no one will violate the law, and to treat him as an offender only after he has done so.

GENERAL CLASSIFICATION OF LEGAL RIGHTS.

What a Right is. In the preceding chapter the term right has been employed in the legal sense exclusively. In that sense it implies something with which the law invests one person, and in respect to which, for his benefit, another, or, perhaps, all others are required by the law to do or perform acts, or to forbear or abstain from acts.¹ Before proceeding further, a classification of rights seems desirable, that we may the better understand the methods which the law has devised for their protection.

Influence of Political Institutions. The general form of political institutions has little to do with the classification of rights, this being in the main the same under all governments. There may be this difference, however, that under some forms of government certain rights will be recognized and provided for, which under other forms will not be given. This is particularly true of those rights which are political; those which are conferred in some countries being few in number, and very imperfectly protected. The general purpose of government is the same under all forms; it exists for the benefit of those who submit and are governed by it, and the benefit is afforded in the establishment and protection of rights. Except for this purpose, no government could for a moment justify its existence.

The rights which every government is expected to recognize and protect may be classed under the following heads: 1. Security in person. 2. Security in the acquisition and enjoyment of property. 3. Security in the family relations. Whether the government be despotic or free, so much will be expected from it; and in a free government there will also be a further class of

1—Austin, Jurisprudence, Lecture XVI.; see also, Lec. VI.

rights, known as political. The theory of political rights is, that they are not given for their own sake and for the benefit [*24] *of those who enjoy them, but for the general benefit of the political society. Their chief advantage to the individual consists in this: That they constitute securities to other rights, so that their value is to be found in what they protect. The right of the English peasant to such property as the law recognized as belonging to him was the same under despotic rule as it is to-day; but the political rights which have been acquired by the people have given it guaranties and a security which it did not have before. What then was often violated with impunity is now assured as completely as the experience of the country up to this time has shown to be practicable. On the feeling of security which political rights afford must mainly depend the content and happiness of the people. Were the government itself, instead of protecting rights, to impose unnecessary restrictions for its own purposes, or the purposes of those wielding its authority, or were it to interfere capriciously to deprive individuals or communities of rights which nominally are assured to the people, there would to that extent be a tyranny, whether the form of government were representative or despotic. A representative government only affords certain security against abuse of power, which cannot be had where political rights are not possessed by the people.

Personal Rights. In the classification above made, the first class embraces the rights which pertain to the person. In this are included the right to life, the right to immunity from attacks and injuries, and the right equally with others similarly circumstanced to control one's own action. In all enlightened countries the same class would also include the right to the benefit of such reputation as one's conduct has entitled him to, and the enjoyment of all such civil rights as are conceded by the law. Political rights may also be included under the same head.

Right to Life. The first and highest of all these is the right to life. On this all others are based, and it is needless to discuss others if the life is not protected. In barbarous periods a man sometimes, for some great crime or contempt of authority, was put

out of the protection of the law, and a term was then applied to him which indicated that he might be treated as a wild beast of prey, and must find his protection in his own strength and cunning. This was the ancient outlawry; and the law under some circumstances *even permitted the life to be taken[*25] with impunity.² But this was a case of forfeiture of rights, and it implied that the outlaw, by his contempt of the law, had justly put himself beyond the pale of human sympathy. No society is so barbarous as not to recognize the right of its several members to their lives, but the securities which are provided for the protection of the right must, in different countries, be as diverse as are the characters of the people. Among the early laws of some people will be found regulations giving to the relatives or friends of one who had been unlawfully slain the privilege of private vengeance. Two different views may be taken of such regulations: 1. That assuming the protection of life to be the concern of the State, they make the friends of the person slain the agents of the State in inflicting punishment, for the reason that the natural feelings and impulses would be more likely to impel them than others to the performance of the duty. 2. That, regarding the protection of the life of an individual as something which specially concerns him and his immediate relatives and friends, rather than the political society, they make the homicide a ground for the just forfeiture of the life of the slayer to those relatives and friends, but not to others. Where such rules prevail, they are likely not to distinguish between criminal homicides and those which are excusable; and it is manifest that they rest upon very unenlightened notions, and can supply to society only a rude and imperfect protection. Indeed, the tendency is to

2—"An outlaw was said *caput gerere lupinum*, by which it was not meant that any one might knock him on the head, as has been falsely imagined, but only in case he would not surrender himself peaceably when taken; for if he made no attempt to fly, his death would be punished as that of any other man, though it seems that in the counties of Hereford and Gloucester, in the neighborhood of the marches of Wales, outlaws were in all cases considered literally *capita lupina*." Reeves' Hist. of English Law, Ch. VIII., Sec. 4; Bl. Com. 178, 319.

cruelty, rather than to justice, and anarchy is encouraged by them, rather than governmental order. In a wiser period, the government takes into its own hands the punishment for homicide, and treats it as a wrong to the State. But this is on the assumption that it is found to be blamable. Governments do not assume to punish innocent acts, however serious may be the consequences resulting from them.³

[*26] *The Germanic nations were accustomed to compound for the taking of life by a money payment, made in part to the king, and in part to the family of the person slain.⁴ This was less barbarous than the method of abandoning the slayer to private vengeance, because it partook of orderly government. But like that, it was suited only to periods of violence, and to people accustomed to protect themselves by strength and valor, instead of looking for redress to the government which should afford it. To demand a money payment for the taking of a life was to give to it no reasonable security whatever; it rather held out inducement to the indulgence of passion by promising immunity at so slight a sacrifice. Wiser laws take notice of the fact that when the passion or depravity is equal to the taking of human life, the government cannot reasonably hope to restrain it, unless the consequences threatened are such as the passionate or depraved would fear the most. In this view, the least that could be threatened would be the loss of whatever renders life valuable, namely, the liberty; the most that could be threatened would be to take the life itself.

But it is manifest that in thus punishing the taking of life, the government gives no protection in the particular case, but instead, is giving indirect protection in other cases. It is impossible to protect life as property is protected, by giving private remedies. Preventive remedies, such as injunction and mandamus, could be of no avail, for they could command no more than the law itself commands. Threats might justify requiring sureties for the peace, but the proceeding to obtain these is crimi-

3—Austin, Jurisprudence (4th ed.) 1092; *People v. Faulks*, 39 Mich. 200.

4—Crabbe's Hist. of English Law. 35-37; Reeves' Hist. of English Law, Ch. I.

nal rather than civil, and of little avail where the real peril is to the life. And supposing the man actually slain, whether through inadvertence or of purpose, a remedy on his behalf has become impossible, since the very act which would give a cause of action would also terminate the existence of the person entitled to it.

If there are taken into the account the many ways in which one person may have an interest in the life of another—the husband in that of the wife, the wife in that of the husband, the child in that of the parent, and so on—it may seem a little remarkable that the common law, after death had been made the penalty for the felonious taking of human life, should not have *allowed the damages suffered by others from an un- [*27] lawful killing to be recovered. The interest which husband and wife possess in each other's life must usually have a pecuniary value which would be estimated for many purposes at a large sum in the dealings with others; as for instance in those relating to insurance; and to the parties themselves, would be invaluable; but when not noticed by the law as a ground for an action, it could only have the incidental and indirect protection which the criminal laws afford; the government thus disregarding the private injury and punishing only the public injury. Here, again, if we speak of a man's estate as that aggregate of possessions which on his decease will pass to his representatives, why should not the money value of his life, when it has been taken away by unlawful act or negligence, be a right of action in the hands of his representatives? It is agreed, however, that the common law made no award of compensation in these cases.⁵

5—Higgins v. Butcher, 1 Brownl. 205; Yelv. 89; Baker v. Bolton, 1 Camp. N. P. 493; Carey v. Berkshire R. R. Co., 1 Cush. 475; Kearney v. Boston & Worcester R. R. Co., 9 Cush. 109; Quin v. Moore, 15 N. Y. 433; Whitford v. Panama R. R. Co., 23 N. Y. 465; Eden v. L. & T. R. Co., 14 B. Mon. 204; Conn. Mu. Life Ins. Co. v. N. Y. & N. H. R. R. Co., 25 Conn. 265, 65 Am. Dec. 571; Ohio & M. R. R. Co. v. Tindall, 13 Ind. 366, 74 Am. Dec. 259; Kramer v. San Francisco, etc., R. R. Co., 25 Cal. 434; Sherman v. Johnson, 58 Vt. 40. In Sullivan v. Union Pacific R. R. Co., 3 Dill. 334, Judge DILLON questions the conclusions in these cases, and is inclined to hold that the father may,

If we look for the reasons, we find them variously stated. One that is assigned is the repugnance of the common law to any estimate of the pecuniary value of human life.⁶ If the proposition were that a money estimate should be made of the life for the purpose of determining the proper penalty for a felonious homicide, this repugnance would be perfectly reasonable. It would also be reasonable that the law should refuse to estimate the

money value of a life against one who, without fault, had [*28] been the instrument or *occasion of its loss. But if life

were taken by the wrongful act or default of another, whether felonious or not, the sentimental objection to making an estimate of the value in money by way of compensation to the persons wronged, could have little of the ordinary hard reason of the law in its support. It was making a sentimental scruple of more importance than justice itself, and in cases in which the killing was through some degree of negligence, but not negligence of that extreme character which would make plain the road to criminal conviction, it defeated justice entirely. Where the killing was felonious it was also said that the common law would not award compensation, because the private injury was drowned in and swallowed up by the public injury;⁷ a purely arbitrary reason, and one which might with more justice have been applied in the cases of public wrongs where the private injury was less extreme. But the reason, such as it was, fails utterly in this country, where the doctrine of the merger of private wrongs in public wrongs is not recognized. We have, therefore, the rule

at common law, maintain suit for loss of services of his minor son by a wrongful act by which he is instantaneously killed. He cites and places some reliance upon *Ford v. Monroe*, 20 Wend. 210, where a father whose minor child was killed, was allowed to recover for loss of services, not merely up to the death, but for the whole period of minority. See *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318. An insurance company can-

not recover from the slayer for the death of a man by reason of which it has been compelled to pay a policy. *Ins. Co. v. Brame*, 95 U. S., 754.

6—*Hyatt v. Adams*, 16 Mich. 180, 191, per CHRISTIANCY, J.: "The life of a freeman cannot be appraised, but that of a slave who might have been sold may." *Grotius*.

7—See next Chapter.

of the common law left to us, but without even the inadequate reasons by which the common law supported it.

From this statement it will appear that Lord Campbell's act,⁸ which gave an action for the benefit of the surviving husband or wife, parent or child of the person whose death should be occasioned by the wrongful act, neglect or default of another, and allowed the value of the life to be assessed by way of compensation, was an act which gave new and important rights. It gave to husband, wife, parent and child, in addition to the rights recognized by the common law, a new and important interest in each other's life. It imposed upon all persons the duty to obey all such laws and observe all such precautions as might be needful to prevent their causing the loss of human life by wrongful act, neglect or default; and imposing this for the benefit of the relatives designated, the correlative right was their right, even though the action on breach of duty was to be brought in the name of the personal representative of the person killed. The act, which in its main features, has been generally adopted in this country, has relieved the law from the glaring absurdity of recognizing claims to service, nurture, support, etc., any interference *with which might give a right of action, but [*29] the destruction of which would give no action whatever.

Personal Immunity. The right to one's person may be said to be a right of complete immunity: to be let alone. The corresponding duty is, not to inflict an injury, and not, within such proximity as might render it successful, to attempt the infliction of an injury. In this particular the duty goes beyond what is required in most cases; for usually an unexecuted purpose or an unsuccessful attempt is not noticed. But the attempt to commit a battery involves many elements of injury not always present in breaches of duty; it involves usually an insult, a putting in fear, a sudden call upon the energies for prompt and effectual resistance. There is very likely a shock to the nerves, and the peace and quiet of the individual is disturbed for a period of greater or less duration. There is consequently abundant reason in support of the rule of law which makes the assault a legal wrong,

8—9 and 10 Vic. c. 93.

even though no battery takes place. Indeed, in this case the law goes still further and makes the attempted blow a criminal offense also.

Threats and Words. A threat to commit an injury is also sometimes made a criminal offense, but it is not an actionable private wrong.⁹ Damages cannot be recovered for a mere threatened injury.¹⁰ Many reasons may be assigned for distinguishing between this case and that of an assault, one of them being that the threat only promises a future injury, and usually gives ample opportunity to provide against it, while an assault must be resisted on the instant. But the principal reason, perhaps, is found in the reluctance of the law to give a cause of action for mere words. Words never constitute an assault, is a time honored maxim.¹¹ Words may be thoughtlessly spoken; they may be misunderstood; they may have indicated to the person threatened nothing but momentary spleen or anger, though when afterward reported by witnesses they seem to express deliberate [*30] malice and purpose to injure. *Even when defamation is complained of the law is very careful to require something more than expressions of anger, reproach, or contempt, before it will interfere; justly considering that it is safer to allow too much liberty than to interpose too much restraint. And comparing assaults and threats, another important difference is to be noted: In the case of threats, as has been stated, preventive remedies are available; but against an assault there are usually

9—Threatening not to employ a man who remains a tenant of a certain landlord, gives the latter no right of action against the employer. *Heywood v. Tillson*, 75 Me. 225.

10—*Empire Transportation Co. v. Johnson*, 76 Conn. 79, 55 Atl. 587; *National Protection Assn. v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135.

11—*Smith v. State*, 39 Miss. 521; *State v. Mooney*, Phill. (N. C.) L.

434. Even though the party at the time has by his side a deadly weapon, which, however, he makes no attempt to use. *Warren v. State*, 33 Texas, 517; *Cutler v. State*, 59 Ind. 300. To point an unloaded pistol at one, at the same time threatening him, is not a legal injury when neither the pointing nor the making the threat would be an injury. *McKay v. State*, 44 Tex. 43, and see cases *161 notes, *post*.

none beyond what the party assaulted has in his power of physical resistance.

Right to Reputation. The law also gives to every man a right to security in his reputation.¹² Perhaps a more accurate statement would be, that it gives him a right to be protected in acquiring, and then in maintaining, a good reputation. Even this does not state the point with entire accuracy, since one may obtain a good reputation when deserving a bad reputation; and in a reputation to which one is not entitled he has no greater claim to protection than he would have in anything else his claim to which was fictitious.

The subject might be illustrated by supposing the case of one coming into a community as an entire stranger. When he comes he can have there no reputation, either good or bad; but he has a right, by good conduct, to acquire a good repute, and there may be said to be a moral obligation resting upon him to do so, since it is his duty to observe the rules of good conduct, and this will be likely to bring him good repute. If, therefore, evil-minded or thoughtless persons, by inventions or insinuations to his discredit, prevent his acquiring a good repute, they thereby invade his right, and he should have the appropriate redress. Referring now to what has already been said of the reluctance of the law to make mere words a ground of action, and postponing explanations to a future occasion, it will suffice for our present purpose to say that there may be interference, provided the following things appear: (1) A false charge or insinuation which (2) is made in malice, and (3) causes damage by its effect on the standing and reputation of the plaintiff. Now it may be that in the case supposed it will be found impracticable to show by evidence of a positive nature that any of the elements of injury exist. *First*, the evidence of falsity may be wanting, because the charge may relate to something in the plaintiff's past history *concerning which information is not [*31] attainable. *Second*, it may appear that the defendant,

12—Harris v. Minville, 48 La. Ann. 908, 19 So. 925 and cases in Chap. 7.

in making the charge, did so on grounds of suspicion which to him were grounds of conviction and consequently he made it without malice. And, *Third*, the plaintiff being still a stranger, it may be said that, as yet he has acquired no standing or reputation which the charge could damage. For these reasons it may be argued that grounds of recovery are absent in such a case. But if this were the law, it is plain it could not be a just law, and it would fall far short of doing adequate justice. It would enable a person of suspicious nature to exclude another from the good opinion of the world when his motives and efforts fairly entitled him to general esteem. The difficulty in the case is overcome by a series of legal presumptions. These may be stated as follows: *First*, every man is presumed to be of good repute until the contrary is shown. *Second*, a derogatory charge against him is presumed to be false. *Third*, being false, it is presumed to be maliciously made. *Fourth*, if its natural and legitimate effect is to cause injury, then it is presumed to have done so in this instance. Thus one fact—that of the publication—and four presumptions of law, support the action.¹³ The exception to this is of cases where the charge is one which, in contemplation of law, is not necessarily followed by injury, in which case the law will not presume damage, but will leave the plaintiff to allege and prove it. These presumptions may, in some cases, seem somewhat violent, but they are nevertheless reasonable. They must be so unless human nature, conduct and reputation, are presumptively bad, so as to justify a legal assumption that an injurious charge is true rather than false. Perhaps if that were to be assumed it would still be reasonable to throw the burden of proof upon the party making the charge, because, if he asserts facts, he ought to know where his evidences are and be able to produce them; while the proof of a negative, in case of a false charge, is notoriously difficult, and the more absolutely without

13—In a subsequent chapter it will be shown that the legal definition of malice in the law of def- amation is quite different from the common meaning.

foundation the charge may be, the more difficult will often be the showing.

In general, however, the law has to deal with the cases of those *who have acquired a reputation of some kind. [*32] Of these there may be several classes:

1. Those who deservedly stand in good repute.
2. Those who deservedly stand in bad repute.
3. Those who undeservedly stand in good repute.
4. Those who undeservedly stand in bad repute.

Upon the case of the man who is justly in good repute we need not pause. The man who is undeservedly in bad repute is entitled to overcome this, and he is wronged by whomsoever interposes obstacles, though they consist in the mere repetition of charges which have made his reputation what it is. What are left, then, are the cases of men who deserve a bad repute whether as yet they have it or not.

A man whose reputation is deservedly not good, may be wronged as well as any other by having that said of him which is untrue. A worthless vagabond suffers a legal injury if he is called a thief when he is not. A certain individual may be generally despised with abundant reason; but if he is a kind and indulgent man in his family, he may justly be entitled to maintain an action if he be accused of treating them with cruelty. But if the charge be true he has no legal ground for complaint. The law has never conferred upon any one the right to be protected against the damaging effect of the truth concerning his character. If he has been enabled to put on a good outward appearance by covering himself with the mantle of hypocrisy, it is not illegal for public inquiry and contempt to tear this away. A dishonest man is not wronged when his good repute is destroyed by exposure.

But at this point it may be necessary to make a distinction between the rights of the political community and the rights of the individual. On grounds of public policy a duty may sometimes be imposed to observe silence for the public good when no such duty is imposed for the protection of the individual. The individual is not to be heard to complain if only the truth is

spoken of him; but an offensive truth may be published without occasion, and may then be harmful. If it bring to light facts the publication of which can benefit no one, either by way of admonition or warning, the correction of abuses or the punishment of offenders, the probable tendency of the publication must

be in the direction of immorality, disorder or violence. It [*33] thus *becomes a public offense; the duty to abstain from that which may injure the public morals or disturb the public peace has been disregarded. And here the very truthfulness of the charge may render it the more injurious to the public order; since a truthful charge which subjects one to ridicule or contempt, or which brings out gross immorality or indecency, if made in mere wantonness and without justifiable occasion, is more likely to corrupt public morals and incite the party assailed to acts of violence than it would be if its falsity could be shown. In the latter case the party might rely upon his innocence or upon his civil remedy to vindicate him; in the former he might feel that only in violence had he any redress whatever.

Civil Rights. In defining civil liberty reference has been made to civil rights. An enumeration of these in detail is neither expedient nor practicable. In a free country they embrace the right to do everything not harmful to the public or to other individuals. The boundaries are such as are prescribed by general regulations of peace for the public good. Perhaps the whole body of civil rights may be summed up in two: The right to exemption from any restraint that has in view no beneficial purpose and the right to participate in all the advantages of organized society. These give the proper liberty and insure against unjust discriminations.

Religious Liberty. Among the first of civil rights is that of enjoying religious freedom.¹⁴ If this is complete, as it is supposed to be in this country, it implies two things: 1. The right freely to render adoration and worship to the Supreme Being in the manner indicated by the belief, and according to the dictates of the individual conscience; and 2. The right to be exempt from

14—See *State v. Scheve*, 65 Neb. 853, 91 N. W. 846.

exactions in support of the worship of others. The first of these may exist where there is only religious toleration; the second enlarges toleration into religious liberty and equality.

But the liberty to worship, like all other liberty, must have bounds prescribed to it as a necessary protection to rights that might be invaded by extravagance or excess in its indulgence. These bounds must be fixed by law; and, as in all other cases of restraining laws, the law on this subject must have regard to the circumstances of the people for whom it is made. One of the most important of these circumstances is the religious belief *which generally prevails among the people. The [*34] same laws which give reasonable protection to religious liberty where one belief prevails, might be abhorrent and therefore wholly inadmissible where a different belief is general. To illustrate this, we have only to see what is tolerated or required by the religious creeds of some people. The religion of some savage tribes permits human sacrifices; and there were saturnalia among the Greeks and Romans; but in Turkey, to-day, where religious liberty is supposed to exist, such sacrifices and orgies would be abhorrent, and the law would punish them. The religion of the Turk, on the other hand, sanctions polygamy, and this in a Christian country would be forbidden and punished as a high offense. But neither in the one case nor in the other is religious liberty violated when that which is abhorrent to the general public is forbidden. There must necessarily be bounds to religious liberty in every country, varying in each with the religious belief and accepted moral code of the people generally. A single sentence may perhaps be sufficient for the presentation of the general principle. Religious liberty in any country cannot embrace those things which the moral sense or sense of decency of the general public condemns, and which consequently cannot be allowed without injury to the public morals.

The acceptance of this as a general rule cannot preclude any government in its discretion tolerating that which its people would condemn, where for any reason of policy it should think proper to establish regulations to that effect. But the general principle that any class of people in a country can rightfully do

that which is offensive to the public morals cannot be accepted. Opinion must be free; religious error the government should not concern itself with; but when the minority of any people feel impelled to indulge in practices or to observe ceremonies that the general community look upon as immoral excess or license, and therefore destructive to public morals, they have no claim to protection in so doing. The State cannot be bound to sanction immorality or crime, even though there be persons in a community with minds so perverted or depraved or ill-informed as to believe it to be countenanced or commanded of heaven. And the standard of immorality and crime must be the general sense of the people embodied in the law. There can be no other.¹⁵

[*35] *When religious liberty is defined, there may still be rules for regulating its enjoyment. We say, in general, that every man is at liberty to worship God according to the dictates of his own conscience. But one man's conscience may perhaps impel him to gather a crowd for worship in the streets of a populous city or to invade the house of worship of people of another belief and interrupt their exercises by substituting his own, or Cassandra-like, to give solemn warnings in legislative halls or courts of justice. These the law must deal with as the excess of liberty, because they encroach upon the just liberty of others or disturb the public order. Concede to every man the liberty to follow what he may assert to be the dictates of his own conscience, and there must soon be no organized society and no rational liberty of any sort. The reason is obvious: Society and liberty, as has been already shown, depend for their existence on regulations and restraints.

Equality of Civil Rights. In a free country all civil rights must be equal, except as the circumstances of individuals or classes create distinctions which it is necessary or proper for the law to recognize. We may illustrate with the right to maintain suits. Every one must possess it, and one is out of the protection of the law who is deprived of it. But there are classes whom it

15—Cooley, Const. Lim. 471, *et seq.*; Woolsey's Political Science, § 52.

may not be proper to permit to manage their suits in their own way. The infant or the *non compos* for instance, who must appear by guardian. But this manifestly is only a regulation of a right; not a denial or even an abridgement of one. The State must deny to no man right and justice, but it may properly regulate the forms and proceedings through which he must obtain them. So the right to acquire an education is an important civil right; but though the State provides for this, it usually establishes schools for those who are within certain ages, and not for any others. In this case the persons within the prescribed ages have a right in the schools under proper regulations; others have a right to make their own voluntary arrangements. The people are impartially arranged into classes, and that is all that can be required. The public highways are for the common use of all, but discriminating regulations are often essential, and it may be deemed politic to prohibit certain classes being abroad in the streets at hours or under circumstances when they or the public *would be peculiarly liable to outrage or injury in [*36] consequence. The reasonableness of such regulations is the concern of legislation, and they may be legal, even when on the score of policy or justice there seems to be abundant ground to question the propriety of the distinctions. The common law did not allow the married woman to make contracts on her own behalf. The general conviction now is that the reasons were insufficient; but while they were accepted and acted upon, the most that one could say would be that this class of persons ought to have the right, but did not. However unfairly any particular discrimination might operate, it will readily be admitted that to give exactly the same rights to all classes under all circumstances would work injustice rather than equality. The case of the infant is perhaps the best illustration here; to give him the same control and management of his property which the law allows to others would only be taking from him a rule of protection which he needs, but which is not needed by others. The infant is undoubtedly entitled to equal consideration in the law with all others; but, equality of civil rights, in a general sense, can only mean equality under impartial regulations; and these

regulations cannot be reasonable or just unless in some cases they recognize or establish important distinctions.

The right to acquire, own and enjoy property may be said to be of universal recognition in government. And this includes the right to select and follow any lawful employment, with a view to the acquisition of property, subject only to reasonable and impartial regulations. The infant has this right of acquisition equally with the adult, and the insane equally with all others. There may be restrictions on control and management of property for the general good, or for the good of the owner, but these guard the right; they are not properly an abridgment of it. Instances of this are found in the requirement of the statute of frauds, that certain contracts and sales shall not be made unless by writing duly signed; the purpose here is not to preclude any proper contracts or sales, but to establish such precautions as will prevent the setting up of contracts and sales which were never made, and establishing them on mistaken or false testimony.

Political Rights. The privilege of participation in the government is conferred as an act of sovereignty on those [*37] whose participation *is supposed to be most beneficial to the State. Being a privilege, no one is supposed to be injured when it is not conferred upon him. The rules of admission will be established by the State on a consideration of the general good.¹⁶ The privilege is not conferred on the very young, and it is sometimes withheld from the ignorant. It is also sometimes made to depend on the possession of property. A defense of such a discrimination is made by some on the ground that one of the chief objects of government is to render it possible to own and enjoy property, and if suffrage were universal, this purpose might be defeated by the government passing into the hands of those who, having no property of their own, may be disposed to despoil others. It may also be said that those ought to control the government whose contributions support it, and that these are the property owners.

16—*Minor v. Happersett*, 21 Cold. 233; *Spencer v. B'd of Reg. Wall.* 162; *Spragins v. Houghton*, 1 McArthur, 169, 29 Am. 3 Ill. 377, 396; *State v. Staten*, 6 Rep. 582.

Still, again, it may be said that the owner of property is *prima facie* better qualified to take part in the government than he who has nothing, because *prima facie* he has exhibited more prudence, thrift and judgment than the other. These theories do not concern us now. When the political privilege is conferred as an act of sovereign power, it becomes for the time being a legal right; a right which others must not disturb, which is capable of being defended, and which may even, for the purposes of legal defense, be considered as having a money value to the possessor. The deprivation thereof may consequently be compensated by a recovery of damages. But a like act of sovereignty to that which confers a political right may take it away. There cannot be, either in the elective franchise or in a public office any vested right as against the sovereignty, except so far as, in forming the constitution of government, it has been agreed that there should be.

Some political privileges are the right of every person, whether an elector or not. Such is the privilege of meeting and discussing public affairs with others. Such, also, are the privileges of petition and remonstrance. Every person under the jurisdiction of the laws has the right to petition for or remonstrate against a change therein, and also to address any official person or body upon any subject which concerns him as an individual, or the public of *which he is a member, and over which such [*38] official person or board is vested with authority. Precautions are taken to guard this right by constitutional provisions, but they cannot be very effectual, because they are easily evaded. The caucus often in advance decides that the petition or remonstrance shall have no influence, and its reception then becomes an idle ceremony.

Family Rights. The following may be mentioned as rights in the family relation:

1. The right of the husband to the society and services of the wife. It is often, and very justly, spoken of as a reproach to the common law, that it recognized in the wife no corresponding right to the society and services of her husband. Theoretically, the duty was imposed upon him to comfort and cherish,

but the duty was one of imperfect obligation, because no remedy whatever was provided for failure to observe it.¹⁷

Some few of the States have provided a remedy for this defect in a single class of cases; that is to say, cases in which the loss to the wife is occasioned by selling or giving to the husband intoxicating drinks. In these cases she is permitted to bring suit against the party who, by furnishing the means of intoxication, has been the cause of the loss, and she is allowed to recover substantial damages, where substantial loss has been suffered.

2. The right of the wife to a reasonable support, to be furnished by her husband.¹⁸ This, also, at the common law [*39] *was a right of imperfect obligation, not only because the remedies for compelling its observance by the husband

17—2 Kent, 182; Reeve Dom. Rel. 110. The subject will be discussed in a subsequent chapter. See *post*, Chap. VIII.

18—Where husband and wife are living together and he makes her an allowance sufficient for her clothes and has forbidden her to pledge his credit, he is not liable as for necessities to a tradesman who has sold her clothing without any notice of the prohibition by the husband, the tradesman having had no reason from prior dealing to suppose that the wife had authority to pledge the husband's credit. *Debenham v. Mellon*, L. R. 5 Q. B. 394; L. R. 6 App. Cas. 24; see *Compton v. Bates*, 10 Ill. App. 78. And where the husband authorizes his wife to purchase goods of a particular tradesman, she cannot pledge his credit elsewhere for what that tradesman could supply. *Jones v. Gutman*, 88 Md. 355, 41 Atl. 792. When a wife leaves the husband's house because of his cruelty or neglect, or with his express or implied consent, the husband is

liable to anyone furnishing her with necessities. *Billings v. Pitcher*, 7 B. Mon. 458; *Mahew v. Thayer*, 8 Gray, 172; *Emmett v. Norton*, 8 C. & P. 565; *Dixon v. Hurrell*, 8 C. & P. 717; *Rawley v. Vandyke*, 3 Esp. 251; *Hodges v. Hodges*, 1 Esp. 441; *Burlen v. Shannon*, 14 Gray, 433; *Cartwright v. Bate*, 1 Allen, 514, 79 Am. Dec. 759; *Hultz v. Gibbs*, 66 Penn. St. 360; *Biddle v. Frazier*, 3 Houst. 258; *Allen v. Aldrich*, 9 Foster, (N. H.) 63; *Pidgin v. Cram*, 8 N. H. 350; *Trotter v. Trotter*, 77 Ill. 510; *Lockwood v. Thomas*, 12 Johns. 248; *Tebbetts v. Hapgood*, 34 N. H. 420; *Walker v. Simpson*, 7 Watts & S. 83, 42 Am. Dec. 216; *Parke v. Kleeber*, 37 Pa. 251; *Snover v. Blair*, 25 N. J. 94; *Pearson v. Darrington*, 32 Ala. 227; *Reese v. Chilton*, 36 Mo. 598; *Clement v. Mattison*, 3 Rich. (S. C.) 93; *Black v. Bryan*, 18 Texas, 453; *Eiler v. Crull*, 99 Ind. 375; *Seybold v. Morgan*, 43 Ill. App. 39; *Brinkerhoff v. Briggs*, 92 Ill. App. 537; in spite of his giving notice to the contrary, Wat-

were inadequate, but because not protected in any way against abridgment or defeat at the hands of other parties.

kings v. De Armond, 89 Ind. 553. So, too, if he deserts his wife and family, he is liable for their necessities. *Hall v. Wier*, 1 Allen, 261; *Walker v. Leighton*, 31 N. H. 111; *St. Vincent's Institute for the Insane v. Davis*, 129 Cal. 20, 61 Pac. 477; *Llewellyn v. Levy*, 163 Pa. St. 647, 30 Atl. 292; and notices, special or general, that he will not be bound will not avail him. *Pierpont v. Wilson*, 49 Conn. 450. The violent temper and unreasonable conduct of the wife will not absolve the husband from his liability. *Carey v. Carey*, 8 App. D. C. 529. If, by his cruelty, he compels his wife to leave him, and she dies while away, he is liable for the reasonable expense of her funeral, without notice of her death. *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *Ambrose v. Kerrison*, 10 C. B. 776; *Bradshaw v. Beard*, 12 C. B. (N. S.), 344; *Seybold v. Morgan*, 43 Ill. App. 39; *Scott v. Carothers*, 17 Ind. App. 673, 47 N. E. 389; *Gleason v. Warner*, 78 Minn. 405, 81 N. W. 206; *Watkins v. Brown*, 89 App. Div. 193, 85 N. Y. S. 820. In *Schelling v. Kankakee Co.*, 96 Ill. App. 432, the husband was held liable for the support of an insane wife at an asylum, such support being deemed a necessary.

When goods are furnished against the husband's express orders to his wife living apart from him, he can be held only if the circumstances give her implied authority to bind him for necessities. *Benjamin v. Dockham*, 132 Mass. 181. He is not liable if she

leaves without sufficient cause. *Hartmann v. Tegart*, 12 Kan. 177; *Oinson v. Heritage*, 45 Ind. 73, 15 Am. Rep. 258; *Allen v. Aldrich*, 29 N. H. 63; *Brown v. Mudgett*, 40 Vt. 68; *Sturtevant v. Starin*, 19 Wis. 268; *McCutchen v. McGahay*, 11 Johns, 281, 6 Am. Dec. 373; *Rutherford v. Coxe*, 11 Mo. 347; *Brown v. Patton*, 3 Humph. 135; *Porter v. Bobb*, 25 Mo. 36; *Evans v. Fisher*, 10 Ill. 569; *Williams v. Prince*, 3 Strobb. 490; *Ross v. Ross*, 69 Ill. 569; *Bevier v. Galloway*, 71 Ill. 517; *Peakes v. Mayhew*, 94 Me. 571, 48 Atl. 172. Mere separation is not enough. The wife must appear to be without fault. *Lippincott's Est.*, 12 Phila. 142.

In *Young v. Valentine*, 177 N. Y. 347, 64 N. E. 643, it is held to be the duty of the husband to support his wife though she have adequate means of her own but in *Hunt v. Hayes*, 64 Vt. 89, 23 Atl. 920, 33 Am. St. Rep. 917, it was held that he was not liable for necessities furnished the wife under such circumstances.

In *Gafford v. Dunham*, 111 Ala. 551, 20 So. 346, it is held that the husband is not liable for necessities furnished the wife and charged to her. The court says: "The common law liability of the husband for necessities and suitable comforts has always rested upon the assumption that credit was given to the husband and not to the wife, and that the purchase was made with his implied assent. In no case did this liability arise when the facts showed affirmatively that credit was given to the

3. The right of the parent to the custody and services of his child,¹⁹ which is qualified by such regulations as the State [*40] may *establish for his benefit and protection, and for the care and preservation of any property of which he may be possessed. One universal regulation is, that the right shall cease at a certain age; at twenty-one, or perhaps, in the case of females, at eighteen. Others which are sometimes established are, that very young children shall not be employed in mines, collieries, or factories, and that for a certain portion of the year they shall be placed in school.

4. The obligation of the parent to support the child, when from immaturity or other cause he is unable to support himself, can

wife and charged to her and the goods were sold, not upon his implied assent that they were to be charged to him." The contrary is held in *Baker v. Carter*, 83 Me. 132, 21 Atl. 834, 23 Am. St. Rep. 764. A married woman living with her husband is not liable for necessities furnished her unless there is an express promise by her to pay. *Nelson v. O'Neal*, 11 Ind. App. 296, 39 N. E. 207; *Nelson v. Spaulding*, 11 Ind. App. 453, 39 N. E. 168.

Where husband and wife separate by mutual consent, and the husband makes a contract with a third person to maintain the wife, if the wife leave such third person voluntarily, and without just cause, she will not carry with her authority to pledge her husband's credit for her support. *Pilgrim v. Cram*, 8 N. H. 350.

The husband has a right to change his domicil, and it is the wife's duty to accompany him, and if she refuses, he is not liable for her support and maintenance. *Babbitt v. Babbitt*, 69 Ill. 277. Husband not liable under penal

statute for failure to support, if wife refuses his offer of support at his father's house because of her dislike to his parents. *People v. Pettit*, 74 N. Y. 320. Where by statutes married women may be liable on their contracts, if goods are bought for ordinary domestic use the legal implication is that the husband is liable. *Wilson v. Herbert*, 41 N. J. L. 454, 32 Am. Rep. 243; *Chester v. Pierce*, 33 Minn. 370. So if domestic servants are hired. *Wagner v. Nagel*, 33 Minn. 348; *Flynn v. Messenger*, 28 Minn. 208, 41 Am. Rep. 279. See further on wife's liability for household necessities. *McQuillen v. Singer Mfg. Co.* 99 Pa. St. 586; *Cook v. Ligon*, 54 Miss. 368; *Harman v. Siler*, 99 Ala. 306, 10 So. 430; *Hyman v. Harding*, 162 Ill. 357, 44 N. E. 754.

19—*Barrett v. Riley*, 42 Ill. App. 258. If the husband deserts the family the wife is entitled to the custody of the children during the continuance of such desertion. *Winslow v. State*, 92 Ala. 78, 9 So. 728.

The right of the parent to the

hardly be said to confer upon the child a right to such support, because the law provides no means of enforcing the parental obligation for his benefit. The common law in this regard left the interests and protection of the child to what must often prove

services of his child may be lost by emancipating him. In brief, the methods in which emancipation may take place are the following:

1. By a formal agreement between the father and child to that effect. *Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 73; *Atwood v. Holcomb*, 39 Conn. 270, 12 Am. Rep. 386; *Wolcott v. Rickey*, 22 Iowa, 172; *Mason v. Hutchins*, 32 Vt. 780; *Hall v. Hall*, 44 N. H. 293.
2. By the father refusing to care and provide for the child. *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Atwood v. Holcomb*, 39 Conn. 270, 12 Am. Rep. 386.
3. By the father suffering the child to depart and act for himself, and employ his own services at his option. *Johnson v. Terry*, 34 Conn. 259; *Everett v. Sherfey*, 1 Iowa, 356; *Whiting v. Earl*, 3 Pick. 201, 15 Am. Dec. 207; *Wodell v. Coggeshall*, 2 Met. 89, 35 Am. Dec. 391; *Bray v. Wheeler*, 29 Vt. 514; *Bell v. Bumpus*, 63 Mich. 375, 29 N. W. Rep. 862. That no formal emancipation is necessary, see *Sword v. Keith*, 31 Mich. 247; *Schoenberg v. Voigt*, 36 Mich. 310; *Haugh, etc., Iron Works v. Duncan*, 2 Ind. App. 264, 28 N. E. 334; *Carthage v. Canton*, 97 Me. 473, 54 Atl. 1104. "Emancipation may be effected by the consent of the parent, evidenced by a written or oral agreement, or from the circumstances when the parent abandons or fails to

support the child." *Robinson v. Hathaway*, 150 Ind. 679, 683, 50 N. E. 883. It is held that there may be a partial emancipation, as for a limited period, or as to service and not as to care, custody and control. "The parent, having the several rights of care, custody, control and service during minority, may surely release from either without waiving his right to the other, or from a part of the time without waiving as to the whole." *Porter v. Powell*, 79 Ia. 151, 155, 44 N. W. 295, 18 Am. St. Rep. 353. A child may be emancipated and still live at home. *Donegan v. Davis*, 66 Ala. 362. There may be complete emancipation by relinquishing the control of the child to another although the latter has not completed a statutory adoption. *West Gardiner v. Manchester*, 72 Me. 509. The consent of a parent to a child's receiving his wages is a license revocable at the will of the parent as between him and the child. *Soldanels v. Missouri, etc., Ry. Co.*, 23 Mo. App. 516.

"The custody of a child is not the subject of gift or barter. A father cannot, by the mere gift of his child, release himself from the obligations to support it or deprive himself of the right to its custody. Such agreements are against public policy and are not strictly enforceable." *Washaw v. Gimble*, 50 Ark. 351, 7 S. W. 389.

the imperfect guardianship of the State. In other words, it imposed the obligation on the parent as a duty to the State, and not as a duty to the child.²⁰

There are other rights to which, in customary but somewhat loose language, it is said the child is entitled: such as the right to protection against injuries and against the unlawful action of others, the right to culture and education, the right to share in the parent's estate.

These are sometimes spoken of as natural rights, and the parent is said to be under an obligation to recognize them. But, as [*41] in the case of other so-called natural rights, this can be no more than a moral obligation, and therefore the rights in a legal sense do not exist. We may test this by supposing any one of the supposed rights violated: that, for instance, of protection. A third person beats the child without justification, the father looking on and not giving the protection which the impulses of affection and the sense of justice should prompt him to afford. In such a case the assaulter is responsible to the State for his criminal attack upon a citizen; he is responsible to the child in a civil action, and he may possibly even be liable to the father if the attack has diminished the child's ability to perform labor. But the father incurs no liability to the child for failure to extend protection.²¹

In thus neglecting the parental obligation he may have demonstrated how lamentably he is wanting in natural feeling, but he has violated no positive command of the law. The same remark holds good when the education of the child is in question. A parent having the necessary ability ought to give his child such an education as will fit him to enter the world of business, literature, science, art, or politics, with such full preparation as will

20—The father is liable for the support of a child, though he voluntarily remains away from his house. *Bradley v. Keen*, 101 Ill. 519. And though the child has an estate of his own. *Fuller v. Fuller* 23 Fla. 236, 2 So. 426; *Hanford v. Prouty*, 133 Ill. 339, 24 N. E. 565;

Bedford v. Bedford, 136 Ill. 354, 26 N. E. 62.

21—A mother, as natural guardian, cannot by an admission deprive her child of a right of action which is a right of property. *Power v. Harlow*, 57 Mich. 107.

enable him to contend for wealth, position, and honors with those whom he may there encounter. But the duty to do this was never imposed by the law; it was left wholly to the dictates of natural affection, family pride, and the other motives which usually are expected to influence the parent in that direction. If these failed of effect, the child at the common law had no remedy whatever. Some steps have recently been taken by statute for the compulsory education of children; but the duty which statutes impose in that direction is imposed as a duty to the State, and its performance is compelled by imposing penalties, not by allowing the child to bring action against the delinquent parent.

The old common law did not empower the parent to dispose of his real estate by testamentary gift and it probably did not permit him to dispose of all his chattels. But since the reign of Henry VIII. a general power to dispose of both species of property has existed, saving, however, the rights of *creditors, and of the widow if there was one. While, [*42] therefore, it is usually expected that the child will be permitted to share in the parent's estate, the law does not insure this as a right. If the parent sees fit to disinherit him, he has no redress. But if the parent makes no will, the law of distributions and descents apports the property among the kindred, usually remembering the children first of all.

There have, in some instances, been statutes which took from the parent some portion of this authority; limiting his power to dispose of property by testamentary gift to a certain proportion thereof, leaving the remainder to pass to those who are designated by the law as heirs and distributees. Even such statutes give no rights to the child as such. They limit the power of the owner over his real estate; but what they give on the owner's death is given, not in recognition of a right, and not necessarily to a child, but to such persons as in that contingency, in view of their relationship to the deceased, the State has thought proper to make his successor in the ownership.

Right to Form the Family. Back of these family rights is the right to form the relation from which at the common law, all

family rights spring: the relation of marriage. In various directions this right is hedged about with conditions, established for the general good. *First.* The person must have attained the prescribed age or the act will be inchoate only and require confirmation when that age is reached. *Second.* The consent of parents or guardian may perhaps be required by law. *Third.* There must be the consent of the person to be married, freely given; for the law only sanctions voluntary arrangements. Some act of publicity may be required to precede it, such as the publishing of banns, or the issue and record of a license. *Fourth.* The law may permit it only under certain prescribed forms, the absence of which will render any voluntary action ineffectual. And, even observing these forms, it is only persons of consenting mind who may marry; by which is meant only those persons who have that degree of legal capacity which the law recognizes as sufficient for entering into contracts of this important nature. When, therefore, it is said that the right to enter into the relation of marriage is universal, this does not exactly express the [*43] legal idea. The legal idea is, that every one *has a legal right to marry who obtains the consent of a person of the opposite sex having a like right, provided both have the capacity and qualifications prescribed by law, and observe all the legal conditions.

Domestic Relations in General. Besides the family relations which spring from marriage there are certain domestic relations of another origin. The relation of master and servant, for instance, is one of contract. The relation of master and apprentice is similar, though here the contracting party on one side may really be the State in some cases. The relation of guardian and ward is of various origin but usually is a matter of judicial creation. But none of these are strictly family relations, or give family rights. Family relations, strictly and fully recognized by the law as such, embrace that formed in marriage and those which spring therefrom. The common law did not even take notice of adoption as giving one any permanent family rights. The adopted child was only permitted to occupy the place of a child for the time being; that is to say, he stood in the position of

child by sufferance only, and had no share in the distribution of the parent's property at his death. The child born out of *matrimony had, at the common law, no claim whatever [*44] upon the parent.²² A step-father is not bound to support or to receive into his family step-children, in the absence of a statute or contract to that effect.²³ But step-children and adopted children who are received into a family stand for the time being in the position of children. They cannot claim compensation for services performed in the family, neither, on the other hand, can they be required to pay for a support received, in the absence of express contract.²⁴

22—It is provided by statute in several States that the intermarriage of the parents of an illegitimate child, and their recognition of him as their offspring, shall legitimate him. As to such legislation see *Morgan v. Perry*, 51 N. H. 559; *Brewer v. Hamor*, 83 Me. 251, 22 Atl. 161. The issue of adulterous intercourse becomes lawful by the marriage of the parents after the death of the first wife of the father. *Hawbecker v. Hawbecker*, 43 Md. 516.

23—*Capek v. Kropik*, 129 Ill. 509, 21 N. E. 836; *Treschman v. Treschman*, 28 Ind. App. 206, 69 N. E. 961; *Dixon v. Hosick*, 101 Ky. 231, 41 S. W. 282; *Gerber v. Bauerline*, 17 Ore. 115, 19 Pat. 849; *Smith v. Rogers*, 24 Kan. 140, 36 Am. Rep. 254; *McMahill v. McMahonill*, 113 Ill. 461; *In re Besondy*, 32 Minn. 385; *Norton v. Ailor*, 11 Lea, 563.

24—*Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301; *Sharp v. Cropsey*, 11 Barb. 224; *Defrance v. Austin*, 9 Penn. St. 309; *Lanz v. Frey*, 19 Pa. St. 366; *Worcester v. Marchant*, 14 Pick. 510; *Brush v.*

Blanchard, 18 Ill. 46; *Freto v. Brown*, 4 Mass. 675; *Bond v. Lockwood*, 33 Ill. 212; *Andrus v. Foster*, 17 Vt. 550; *Lunay v. Vantyne*, 40 Vt. 501; *Hussey v. Roundtree*, *Busbee*, 510; *Gillett v. Camp*, 27 Mo. 541; *Murdock v. Murdock*, 7 Cal. 511; *Mowbry v. Mowbry*, 64 Ill. 383; *Muhlert v. McDavitt*, 16 Gray, 404; *Meyer v. Temme*, 72 Ill. 574; *McMahill v. McMahonill*, 113 Ill. 461; *Sword v. Keith*, 31 Mich. 247; *Ruckman's Appeal*, 61 Pa. St. 251; *Brown v. Welsh*, 27 N. J. Eq. 429; *Dissenger's case*, 39 N. J. Eq. 227; *Gerds v. Weiser*, 54 Ia. 591, 37 Am. Rep. 229; *Ela v. Brand*, 63 N. H. 14; *Norton v. Ailor*, 11 Lea, 563, *In re Besondy*, 32 Minn. 385; *Smith v. Rogers*, 24 Kan. 140, 36 Am. Rep. 254; *Capek v. Kropik*, 129 Ill. 509, 21 N. E. 836; *Dixon v. Hosick*, 101 Ky. 231, 41 S. W. 282. In England the statute 4 and 5 W. IV. c. 76, § 75, requires the husband to support the children of his wife, legitimate or illegitimate, until they reach the age of sixteen or their mother dies.

Statutory Adoption. The statutes of many states provide for the adoption of children and give to the children so adopted the rights more or less complete of natural children.²⁵ Such statutes are in derogation of the common law and to be strictly construed.²⁶ In general a child adopted in accordance with the statute will have the rights of a natural child, especially as respects the inheritance or devolution of property from the adopting parent.²⁷ A child so adopted is the heir of the adopting parents²⁸ and has been held to be his *issue*,²⁹ but is not a *bodily* heir.³⁰ An adopted child was held to be a child *born* to the adopting parent, within the meaning of a statute making provision for

25—See *Commonwealth v. Nancrede*, 32 Pa. St. 389; *Sewall v. Roberts*, 115 Mass. 262; *Safford v. Houghton*, 48 Vt. 236; *Barnes v. Allen*, 25 Ind. 222; *Russell v. Russell*, 84 Ala. 48, 3 So. 900.

26—*Watts v. Dull*, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; *Bresser v. Saarmon*, 112 Ia. 720, 84 N. W. 920; *Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

27—*Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *Flannigan v. Howard*, 200 Ill. 396, 65 N. E. 782, 93 Am. St. Rep. 201, 59 L. R. A. 664; *Bray v. Miles*, 23 Ind. App. 432, 54 N. Y. 446, 55 N. E. 510; *Warren v. Prescott*, 84 Me. 483, 24 Atl. 948, 30 Am. St. Rep. 370, 17 L. R. A. 435; *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520; *Power v. Hafley*, 85 Ky. 674; *Fosburgh v. Rogers*, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201; *Martin v. Long*, 53 Neb. 694, 74 N. W. 43; *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71. If statutes give an adopted child the right to inherit from the foster parent but do not give expressly a reciprocal right to the latter, the estate of an adopted child descends

to his blood kindred. *Hole v. Robbins*, 53 Wis. 514; *Barnhizel v. Ferrell*, 47 Ind. 335. In Illinois such child can inherit only from the person adopting, not from a child of such persons. *Keegan v. Geraghty*, 101 Ill. 26. If one adopts children of his deceased daughter they take as his own children and also the share of their mother. *Wagner v. Varner*, 50 Ia. 532. If a man without his wife's concurrence adopts a child, it would not become the heir of his widow. *Sharkey v. McDermott*, 16 Mo. App. 80. As to inheriting when adoption has taken place in another State, see *Ross v. Ross*, 129 Mass. 243; *Keegan v. Geraghty*, 101 Ill. 26; *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207.

28—*Clarkson v. Hatton*, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748 and cases cited in last note.

29—*Buckley v. Frasier*, 153 Mass. 525, 27 N. E. 768.

30—*Clarkson v. Hatton*, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748; *Balch v. Johnson*, 106 Tenn. 249, 61 S. W. 289.

a child born to a testator after the making of his will.³¹ Unless the language of the statute excludes it, adults as well as minors may be adopted under its provisions.³² The parent is, of course, entitled to the custody, services and earnings of the adopted child, as in case of natural children.³³

Family, as Such, No Rights. It was remarked in the preceding chapter that the law only recognized individual rights; it did not recognize associations except as so many individuals, each having a distinct legal identity and distinct legal rights. An apparent exception was made in the case of a corporation, but only by aggregating the persons composing the corporation and treating them all as one artificial person. The remark holds good in the case of the family; the family as such has no distinct rights in the law. The father has a certain position in the family, and this he may defend against outside assailants; the wife has also a certain position in the family, and the children have their respective positions; but the act which destroys the family or takes away any of its component parts is not in law a family wrong, but only a wrong to individual members of the family. Thus this fundamental relation, which is older than civilization, and must always precede and always accompany it, and without which there can be neither social state in which morality or decency will be recognized, nor civil state with regulated liberty and order, is only indirectly recognized in the recognition of *rights of its constituent members. Whether it would [*45] be wiser for the law to give positive recognition to the family as a legal entity, and confer rights to definite legal positions therein, is something which experience could alone determine. Religion, we have seen, is only indirectly recognized in the law, in the regulations that are made for the protection of

31—*Flannigan v. Howard*, 200 Ind. 294, 31 N. E. 1047, 17 L. R. Ill. 396, 65 N. E. 782, 93 Am. St. A. 806; *Collamore v. Learned*, 171 Rep. 201, 59 L. R. A. 664. An adopted child is not next akin of

33—*Tilley v. Harrison*, 91 Ala. 295, 8 So. 802; *Cofer v. Scroggins*, 98 Ala. 342, 11 So. 747, 39 Am. St. Rep. 54; *Monk v. McDaniel*, 116 Ga. 108, 42 S. E. 360.

32—*Markover v. Krauss*, 132

worshippers, and yet religion, doubtless, is most prosperous when the State interferes with it least. And it is probably true that in the vast majority of cases the natural impulses and affections have more influence in insuring the observance of moral obligations in the family relations than the law could exercise or possess.

Taking away Rights. All the rights which have been enumerated are subject to be taken away by an act of sovereignty accomplished under legal forms. This is sometimes done by way of forfeiture or punishment, as life or liberty is taken away for felony. In other cases it is done in the regular administration of justice to others, as family rights are taken in granting a divorce, or property is taken in compelling the satisfaction of a debt. In still other cases a man deprives himself of the legal protection of rights by his own illegal conduct. Thus, to a certain extent, a man puts aside the protection of the law when he makes an assault upon another, for the other may lawfully inflict injury upon him in necessary self-defense.³⁴ So, if he [*46] engages in an illegal act, and thereby exposes himself to the negligence of another, he waives any right to redress, because any exposure to injury under such circumstances is as culpable in him as is the negligence in his associate, and the result

34—Dr. WOOLSEY, speaking of self-defense, considers the party defending himself, as for the time, in so doing, an instrument of the law in administering its justice. He says: "There are seeming cases of collision which must be explained by the essential limitation of certain rights. One of these is the right of taking life in lawful self-defense, as when a man is attacked by a robber. The harmless passenger and the highwayman have both by nature a right to life, but the right is not unlimited; otherwise the State could not take the life of the criminal, and the man who respects his obligations would be required to renounce for ever the right of self-defense against enemies seeking his life. The true statement is that the right of self-defense belongs only to the innocent man, and not, in this particular case, to the robber. He has the general right of life, but now he is in effect punished for a crime, and there can be no punishment without deprivation of rights." And again: "It might seem that a man who, in self-defense, takes away the life of a robber, does an injury to another. The true statement, however, seems to have been given already; he does no in-

comes from a concurrence of blamable conduct. The principle will be further considered in another place. Here it may be stated in a few words: A person cannot make his own illegal action the foundation of a legal right. Therefore, if, as a consequence of his own illegal action, he suffers a wrong, he must not look to the law for redress. *Ex dolo malo non oritur actio*. He has invited what has come, and he must accept it.³⁵

jury to the robber, although he does harm to him, for he acts as a minister of justice." Political Science, § 18. This is not at all the legal view. The right of self-defense is given solely for self-protection, and it is limited strictly to the necessity. The moment one exceeds the limit of the necessity and proceeds to "punish" his assailant, or to make himself a "minister of justice" he becomes himself an object of punishment. 35—Broom, Legal Maxims, 571.

CIVIL INJURIES; THEIR ELEMENTS AND THE REMEDIES FOR THEIR
COMMISSION.

In a previous chapter it was said that the law undertakes to give security to the rights of individuals by putting within their reach suitable redress whenever their rights have been actually violated.¹ Before any violation has in fact taken place, the law assumes that none will happen; but that each individual will respect the rights of all others. Therefore, it does not undertake in general to provide preventive remedies; it gives them in a few exceptional cases, which stand on peculiar grounds, and in which the mischiefs flowing from an invasion of rights might be such as would be incapable of complete redress in the ordinary methods, or perhaps in any manner. In most cases it is assumed that, if the law places within the reach of every one a suitable remedy to which he may resort when he suffers an injury, it has thereby not only provided for him adequate protection, but has given him all that public policy demands. The remedies that are aimed at wrongs not yet committed but only threatened, are so susceptible of abuse that they are wisely restricted within very narrow limits.

Redress by the Party's own Act. In a few cases the party injured is allowed to redress his own wrong, in whole or in part, without calling in the aid of the law. But the cases in which this is permitted are not numerous, and they are in the main cases of urgency, in which a resort to the ordinary remedies would be inadequate to complete justice. A general permission to every man to take the law into his own hands for his own redress, would be subversive of civil government; the permission

1—Ante, p. 4-7.

cannot safely go beyond those cases in which force is justifiable in defense of person or property, and other cases resting on similar reasons.

***Abatement of Nuisance.** One instance in which redress by the act of the party is admitted, is where a nuisance exists to his prejudice; either a private nuisance or a public nuisance from which he suffers a special and peculiar injury. The redress here consists in removing that which constitutes the nuisance, and it is allowed, not because of any injury it may have done, but to prevent the injury it may do. It is, therefore, in some sense, a preventive remedy, not a compensatory remedy: for damages suffered the party is left to the ordinary action.

The question who may abate a nuisance may depend upon whether the nuisance is public or private. If it is a private nuisance, he only can abate it who is injured by its continuance: if it is a public nuisance, he only may abate it who suffers a special grievance not felt by the public in general. Therefore, if one places an obstruction in a public street, an individual who is incommoded by it may remove it;² but unless he has occa-

2—*Lincoln v. Chadbourne*, 56 Me. 197; *Corthell v. Holmes*, 88 Me. 376, 34 Atl. 173; *Pontiac, etc., Plank Road Co. v. Hilton*, 69 Mich. 115, 36 N. W. 739; *Johnson v Maxwell*, 2 Wash. 482, 27 Pac. 1071. The proprietors of a steamboat on a navigable river may tear away sufficient of a bridge to enable them to take their boat through, where the bridge has been constructed without a draw, and the proprietors, after notice, have neglected to remove the bridge or put in a draw. *State v. Parrott*, 71 N. C. 311, 17 Am. Rep. 5. One may remove a wharf built in navigable water in front of and disconnected with his land which prevents access to it. *Larson v. Furlong*, 63 Wis. 323. See *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Inhab.*

of Arundel v. McCulloch, 10 Mass. 70; *People v. Severance*, 125 Mich. 556, 84 N. W. 1089; *McCarthy v. Murphy*, 119 Wis. 159, 96 N. W. 531, 100 Am. St. Rep. 876. If a highway officer by digging a drain causes a private nuisance to an abutting owner, the latter may abate it if he does not interfere with the use of the road. *State v. Smith*, 52 Wis. 134; *Schofield v. Cooper*, 126 Ia. 334, 102 N. W. 110. If by filling up a public culvert water is turned on land, the owner may open the culvert. *Reed v. Cheney*, 111 Ind. 387. But an encroachment on a public way not amounting to an obstruction of the travelled part of the road will not justify an individual in abating it. *Godsell v. Fleming*, 59 Wis. 52.

sion to make use of the highway he must leave the public injury³ to be redressed by the public authorities. It is the [*49] *existence of an emergency which justifies the interference of the individual.⁴ Generally whenever a public nuisance obstructs the exercise of a private right, the party hin-

3—Mayor of Colchester v. Brooke, 7 Q. B. 339; Dimes v. Pettey, 15 Q. B. 276; Davies v. Mann, 10 M. & W. 546; Bateman v. Bluck, 18 Q. B. 870; Eastern Co. R. Co. v. Dorling, 6 C. B. (N. S.) 821; Roberts v. Rose, 3 H. & C. 162; S. C., L. R. 1 Ex. 82; Arundel v. McCulloch, 10 Mass. 70; Brown v. Perkins, 12 Gray, 89; Lansing v. Smith, 8 Cow. 146; Rogers v. Rogers, 14 Wendell, 131; Ely v. Supervisors, 36 N. Y. 297; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Adams v. Beach, 6 Hill, 271; Burnham v. Hotchkiss, 14 Conn. 311; State v. Paul, 5 R. I. 185; Hopkins v. Crombie, 4 N. H. 520; Amoskeag Co. v. Goodale, 46 N. H. 53; Rung v. Shoneberger, 2 Watts, 23; Philber v. Matson, 14 Pa. St. 306; Gates v. Blincoe, 2 Dana, 158, 26 Am. Dec. 440; Gray v. Ayers, 7 Dana, 375, 32 Am. Dec. 107; Selman v. Wolfe, 27 Texas, 68; Moffett v. Brewer, 1 Iowa, 348. In Brown v. Perkins, 12 Gray, 89, 101, SHAW, Ch. J., says: "The true theory of abatement of nuisance is, that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing." See Hopkins v. Crombie, 4 N. H. 520; Griffith v. McCullum, 46 Barb. 561; Bateman

v. Bluck, 18 Q. B. 870; Mayor, etc., of Colchester v. Brooke, 7 Q. B. 339, 377. One may not abate as a public nuisance an unsightly building standing in navigable water in front of his villa on the ground that it renders his land less accessible, unless he has failed in an attempt to approach the land, or has been deterred from attempting it. He can abate it only if specially injured by it *qua* public nuisance. Bowden v. Lewis, 13 R. I. 189, 43 Am. Rep. 1.

4—"When a public nuisance obstructs an individual's right, he may remove it to enable him to enjoy that right. But the right to abate a public nuisance by one individual goes no farther. He is not authorized to abate it merely because it is a public nuisance." Corthell v. Holmes, 87 Me. 24, 27, 32 Atl. 715. In Burnham v. Hotchkiss, 14 Conn. 310, 317, it is said that a common nuisance may be removed, or, in legal language, abated by any individual; for which the general language of several authorities is cited. But the cases in which the question has been carefully considered restrict the right as above shown.

A right to abate a structure as a nuisance gives one no right to appropriate the materials thereof; Larson v. Furlong, 50 Wis. 681, unless such materials were taken tortiously from the one abating, *id.* 63 Wis. 323. If oysters are

dered may abate the same.⁵ Private nuisances may be abated by the party injured and one may enter upon another's property for the purpose.⁶ In all cases one who attempts to abate a thing as a nuisance, acts at his peril and will be liable for the consequences, unless he can establish the fact of nuisance.⁷

In permitting this redress, certain restrictions are imposed to prevent abuse or unnecessary injury. One of these is, that the right must not be exercised to the prejudice of the public peace: therefore, if the abatement is resisted, it becomes necessary to seek in the courts the ordinary legal remedies.⁸ Another is that, *as a general rule, before resorting to such extreme [*50] measures, the party responsible for the nuisance should be notified of its existence, and requested to remove it; and the forcible abatement would only be justified when, after lapse of

planted by one individual in public waters so as to become a public nuisance, another may not take them; *Grace v. Willetts*, 50 N. J. L. 414, 14 Atl. 559; but if the latter, in taking clams rightfully, disturbs the oyster bed unintentionally, he is not liable; *Brown v. DeGroff*, 50 N. J. L. 409, 14 Atl. 419. The fact that one has neglected to abate a nuisance when he might does not preclude his recovery for his injury; *Jarvis v. St. Louis & Co.*, 26 Mo. App. 253; at least not for that afterward suffered, if there was no apparent danger of serious injury at the time of such neglect. *Copper v. Dolvin*, 68 Ia. 757, 56 Am. Rep. 872.

5—*Brown v. DeGroff*, 50 N. J. L. 409, 14 Atl. 219.

6—*Winchell v. Clark*, 68 Mich. 64, 35 N. W. 907; *Liles v. Cawthorn*, 78 Miss. 559, 29 So. 834; *Martin v. Gainesville, etc., R. R. Co.*, 78 Ga. 307. A dog which

prowls about one's buildings at night howling and annoying the inmates may be abated as a nuisance. *Meneley v. Carson*, 55 Ill. App. 74.

7—*People v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522.

8—*Pontiac, etc., Plank Road Co. v. Hilton*, 69 Mich. 115, 36 N. W. 739; *Miller et. al v. Burch*, 32 Texas, 208, 5 Am. Rep. 242; *Day v. Day*, 4 Md. 262; *Turner v. Holtzman*, 54 Md. 148; *Graves v. Shattuck*, 35 New Hamp. 257, 69 Am. Dec. 536; *Perry v. Fitzhowe*, 8 Q. B. 757; *Baldwin v. Smith*, 82 Ill. 162. In the case last mentioned, the question mainly discussed was whether, when the nuisance consists in a dwelling house which is inhabited, and which has been wrongfully erected where the defendant had a right of common, the latter could lawfully pull it down while the family were in it; and the conclusion was that from

reasonable time, the request was not complied with.⁹ This, however, is by no means a universal rule. It has been said, in one case: "Nuisances by act of commission are committed in defiance of those whom such nuisances injure; and the injured party may abate them without notice to the party who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases which have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord HALE, and appeal to a court of justice."¹⁰ If we take this as a correct statement of the circumstances under which the nuisance may be abated without previous notice, it would seem that notice is not essential where the grievance has arisen from the positive wrongful act or gross negligence of the party responsible for its continuance, or where it threatens such immediate injury to life or health that the allowance of time for its removal, beyond what is absolutely essential, could not reasonably be demanded. Under this rule, if the nuisance were

the necessary tendency of such an act to a breach of the peace, the law could not permit it.

In some cases, however, parties have been held justified in removing houses which were nuisances, even while the families were in them. *Davis v. Williams*, 16 Q. B. 546; *Burling v. Read*, 11 Q. B. 904; *Meeker v. Van Rensselaer*, 15 Wend. 397. But where notice of the intention to remove was not

given, it was held to be unjustifiable. *Jones v. Jones*, 1 H. & C. 1.

9—*Perry v. Fitzhowe*, 8 Q. B. 776; *Burling v. Read*, 11 Q. B. 904; *Davis v. Williams*, 16 Q. B. 546; *Jones v. Jones*, 1 H. & C. 1; *Meeker v. Van Rensselaer*, 15 Wend. 397; *State v. Parrott*, 71 N. C. 311, 17 Am. Rep. 5.

10—*Best, J. in Earl of Lonsdale v. Nelson*, 2 B. & C. 302, 311.

merely permitted by the alienee of the party creating it, notice to remove it would *be essential in all cases which were not of extreme urgency;¹¹ and in such cases this is obvious- [*51] ly a very proper requirement.

Another limitation upon the right is, that in its exercise the party must inflict as little injury as possible.¹² The fact that he is taking the law into his own hands, imposes upon him a special obligation to keep clearly within the necessity which justifies it; and if he is guilty of wanton or unnecessary violence, he is liable for the excess.¹³ A building is not to be destroyed merely because the use to which it is put is a nuisance;¹⁴

*nor because it has become offensive, if the cause of offense [*52] can otherwise be removed. The nuisance of a bawdy house is not in the building itself, but in the character of its occupa-

11—*Penruddock's Case*, 5 Rep. 101; *Jones v. Williams*, 11 M. & W. 176; *Van Wormer v. Albany*, 15 Wend. 262; *Meeker v. Van Rensselaer*, 15 Wend. 397. In the two cases last cited, buildings were torn down as nuisances during the prevalence of Asiatic cholera, no previous notice having been given, except to the tenants, to remove. And see *Hart v. Albany*, 3 Paige, 213. See also *Occum Co. v. Sprague Co.*, 34 Conn. 529; *Shepard v. People*, 40 Mich. 487.

12—*Corthell v. Holmes*, 88 Me. 376, 34 Atl. 173. "Where a person attempts to justify an interference with the property of another, in order to abate a nuisance, he may justify himself as against the wrong doer, so far as his interference is positively necessary. We are also agreed that in abating the nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think if, by one of these alternative methods, some wrong

would be done to an innocent third party, or to the public, then that method cannot be justified at all, although an interference with the wrong doer himself might be justified. Therefore, where the alternative method involves such an interference, it must not be adopted, and it may become necessary to abate the nuisance in a manner more onerous to the wrong doer." *Blackburn, J.*, in *Roberts v. Rose*, L. R. 1 Ex. 82, 89. In removing a chattel wrongfully placed on one's land, one must do no needless damage to the chattel. *Burnham v. Jenness*, 54 Vt. 272. Ordinary care and skill is the measure of duty. *Mark v. Hudson, etc. Co.*, 103 N. Y. 28.

13—*Greenslade v. Halliday*, 6 Bing. 379; *Roberts v. Rose*, L. R. 1 Exch. 82; *State v. Moffett*, 1 Greene (Iowa), 247; *Moffett v. Brewer*, *Ibid.* 348; *Indianapolis v. Miller*, 27 Ind. 394; *Cobb v. Bennett*, 75 Pa. St. 326, 15 Am. Rep. 752.

14—*Bristol Door & L. Co. v.*

tion;¹⁵ and a barn which has become offensive by reason of the accumulation of filth, is to be cleaned instead of destroyed, when cleaning is practicable.¹⁶ It is only where an erection or structure in itself constitutes a nuisance because of its being erected in a public street, or without right either on public or private grounds that its demolition and removal can be justified.¹⁷

Abatement of the nuisance by the act of the party aggrieved does not preclude an action for damages. "It is a preventive remedy merely, and resembles more an entry into land, or recapture of personal property. Neither will bar an action for the original invasion of the plaintiff's right."¹⁸

Defense of Person or Property. The right to defend one's own person, the right to defend anyone standing in the relation of husband and wife, parent and child, or master and servant, and the right to defend one's property, are rights given, not for the redress of injuries, but for their prevention. The right is

Bristol, 97 Va. 304, 33 S. E. 588, 75 Am. St. Rep. 783; Welch v. Stowell, 2 Doug. Mich. 332; Barclay v. Commonwealth, 25 Pa. St. 503, 64 Am. Dec. 715; State v. Paul, 5 R. I. 185; State v. Keeran, 5 R. I. 497; Ely v. Supervisors of Niagara, 36 N. Y. 297; Miller v. Burch, 32 Texas 208, 5 Am. Rep. 242; Brown v. Perkins, 12 Gray, 89; Earp v. Lee, 71 Ill. 193, 5 Am. Rep. 242. In Van Wormer v. Albany, 15 Wend. 262, and Meeker v. Van Rensselaer, Ib. 397, the destruction of the building itself seems to have been justified, on the ground, apparently, that it was impossible otherwise to remove the cause of disease. This subject was fully and carefully considered, and the authorities collected in Brightman v. Bristol, 65 Me. 426, 20 Am. Rep. 711. The case was one where a building, in which a business offensive from

its smells was carried on, was torn down to abate the nuisance. This method of abatement was held unjustifiable, and the proprietor recovered the full value of his building.

15—King v. Rosewell, 2 Salk. 459; Welch v. Stowell, 2 Doug. Mich. 332; Ely v. Supervisors of Niagara, 36 N. Y. 297.

16—The nuisance of a pond of water is not to be abated by filling it up. Finley v. Hershey, 41 Iowa, 389. A tannery is not *per se* a nuisance, and should not be abated as such without proper legal proceedings. Marshall v. Street Commissioner, 36 N. J. 283.

17—Barclay v. Commonwealth, 25 Penn. St. 503, 64 Am. Rep. 715.

18—Pierce v. Dart, 7 Cow. 609, 612. See, also, Wetmore v. Tracy, 14 Wend. 250, 28 Am. Dec. 525; State v. Moffett, 1 Greene, (Iowa) 247.

limited strictly to the necessity, and the redress for any injury actually sustained must be sought by suit.

Recaption or Reprisal is a remedy by the act of the party himself, where any of his personal property, or any person to whose custody he is entitled, is taken or detained away from him. This consists in retaking the same into his own possession whenever or wherever he may peaceably do so. But this right is subordinate to the preservation of the public peace; for "the public peace is a superior consideration to any man's private property," and "if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease; the *strong would give law to the weak, and every [*53] man would revert to a state of nature."¹⁹

Fifty dollars lost money had been charged to a bookkeeper and deducted from his salary. On a subsequent occasion, when he had received money with which to pay the help, he took out the fifty dollars and his salary to that date and returned the balance, stating what he had done, and that he acted under legal advice and was going to quit his position. Starting to leave the office, his employers undertook to retake the money by force. For the assault so committed the bookkeeper brought suit and recovered judgment. In affirming the judgment the court says: "If one takes another's property from his possession without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault in thus defending his right, by using force to prevent his property from being carried away. But this right of defence

19—3 Bl. Com. 4: see *Davis v. 123. But the fact that a breach Whebridge*, 2 Strob. 232; *Hyatt v. of the peace was committed in taking the property does not make Wood*, 4 Johns. 150, 158, 4 Am. the taking, if otherwise rightful, a trespass; it only subjects the party to a public prosecution. Dec. 258; *Evertson v. Sutton*, 5 Wend. 281, 285; *Higgins v. State*, 7 Ind. 549; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Brown v. Cram*, 1 N. H. 171; *Harris v. Marco*, 16 S. C. 575; *Blades v. Higgs*, 10 C. B. (N. S.) 713; *Mills v. Wooten*, 59 Ill. 234. *Barr v. Post*, 56 Neb. 698, 77 N. W.

and recapture involves two things: first, possession by the owner, and, second, a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another who, honestly, though erroneously, claims it as his own, the owner has no right to take it by personal force.'^{19a}

In order to a correct understanding of this right of recaption, it is necessary to have in mind the different circumstances under which one's goods may be upon the premises of another, and the persons who may be responsible for their being there. It is a general rule, that the owner of real estate is entitled to exclusive possession thereof, and every unauthorized entry thereon is a trespass; but if one take the goods of another, and carry them upon his own land, the owner may enter to retake them, because the wrong of the other excuses the entry.²⁰

So if one, though not purposely a wrong-doer himself, has received possession from another whose possession was tortious, the owner may enter to retake them; the tortfeasor being incapable of conferring any better right than he himself had.²¹

So if one sells goods which are in his own possession, and nothing in the contract of sale indicates that they are to be de-

19a—*Kirby v. Foster*, 17 R. I. 437, 22 Atl. 1111, 14 L. R. A. 317. In *Commonwealth v. Donohue*, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L. R. A. 623, it was held that when property is wrongfully taken from one, the owner may regain it forthwith by the use of reasonable force, short of wounding or the employment of a dangerous weapon. Compare *Barr v. Post*, 56 Neb. 698, 77 N. W. 123.

20—*Chapman v. Thumblethorp*, Cro. Eliz. 329; *Patrick v. Colerick*, 3 M. & W. 483; *Webb v. Beavan*, 6 M. & G. 1055; *Richardson v. Anthony*, 12 Vt. 273; *White v. Twitchell*, 25 Vt. 620, 60 Am. Dec. 294; *Spencer v. McGowen*, 13 Wend. 256; *Newkirk v. Sabler*, 9 Barb. 652, 656; *Burns v. Johnson*, 1 J.

J. Marsh, 196; *State v. Elliott*, 11 N. H. 540; *Sterling v. Warden*, 51 N. H. 217, 228, 12 Am. Rep. 80; *Allen v. Feland*, 10 B. Mon. 306; *Chambers v. Bedell*, 2 W. & S. 125, 37 Am. Dec. 508; *Madden v. Brown*, 8 App. Div. 454, 40 N. Y. S. 714; provided no more force is used than is necessary to accomplish it. *Hopkins v. Dickson*, 59 N. H. 235; *Carter v. Sutherland*, 52 Mich. 597. The owner of goods levied on as those of the judgment debtor may retake them from the officer. *Burt v. Blake*, 14 Ill. App. 324.

21—*Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Parish v. Morey*, 40 Mich. 417; *McLeod v. Jones*, 105 Mass. 403, 405, 7 Am. Rep. 539.

livered elsewhere than where they are, the sale itself is an implied license to the purchaser to enter and take the goods away; and this license being coupled with an interest, is incapable of being revoked.²²

*So where one, upon his own land, has been rightfully [*54] in possession of property, but his right has terminated and been acquired by another, the latter may lawfully enter to take it away; as in the case of a government officer, who may justify entering upon the premises of his predecessor to remove the public property there remaining.²³ One who obtains property by a fraudulent purchase becomes a wrong-doer in respect to the possession so soon as the sale is rescinded for the fraud, and the vendor may reclaim it by peaceable entry.²⁴ The right

22—*Wood v. Manley*, 11 Ad. & El. 34; *Giles v. Simonds*, 15 Gray, 441; *Nettleton v. Sikes*, 8 Met. 34; *Miller v. State*, 39 Ind. 267. The sale of growing trees gives a license to enter and cut within a reasonable time. *Heflin v. Bingham*, 56 Ala. 566. The doctrine and the limitations upon it are thus stated by Wells, J., in *McLeod v. Jones*, 105 Mass. 403, 406, 7 Am. Rep. 539: "A license is implied, because it is necessary to carry the sale into complete effect, and is therefore presumed to have been in the contemplation of the parties. It forms a part of the contract of sale. The seller cannot deprive the purchaser of his property, or drive him to an action for its recovery, by withdrawing his implied permission to come and take it. This proposition does not apply, of course, to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before such severance.

"But there is no such inference to be drawn when the property, at the time of the sale, is not upon the seller's premises, or when, by the terms of the contract, it is to be delivered elsewhere. And when there is nothing executory or incomplete between the parties in respect to the property, and there is no relation of contract between them respecting it, except what results from the facts of legal ownership in one and possession in the other, no inference of a license to enter upon lands for the recovery of the property can be drawn from that relation alone. 20 Vin. Abr. 508, *Trespass*, H. a. 2 pl. 18; *Anthony v. Haney*, 8 Bing. 186; *Williams v. Morris*, 8 M. & W. 488."

23—*Sterling v. Warden*, 52 N. H. 197: see, also, the case of *Burridge v. Nicholetts*, 6 H. & N. 383. A tenant, after the relation is dissolved, may enter to reclaim his goods. *Daniels v. Brown*, 34 N. H. 456, 69 Am. Dec. 505.

24—*Wheeldon v. Lowell*, 50 Me.

to retake is not lost by the wrong-doer having put the chattel to such a use that removing it inflicts a damage upon him, but he must take all such risks as are incident to an exercise of the owner's right.²⁵ And in any case, if one's property is on the

land of another, with either the express or the implied assent of the latter, the former may enter to remove it,²⁶ subject, [*55] we should *say, to this restriction: That notice should

be given of the intent to do so, whenever, under the circumstances, it can reasonably be supposed that notice to the land-owner can be important to the protection of his own rights. The time and the circumstances, also, ought to be suitable; one should not enter his neighbor's house unannounced, or in the night time, to take away an article left there by permission, nor, if the chattel is under lock, break open doors or fastenings, without first making demand for its restoration.²⁷ And if a third party shall take the property of one, and place it upon the land of another, without the consent or co-operation of either, while the latter, perhaps, might forbid the entry of the owner to remove it, and hold him a trespasser if he should persist in doing so, yet in that case he would be under obligation to restore it on demand, and the owner might proceed, by replevin, to take it, on his refusal.²⁸

499: see *Rea v. Shepard*, 2 M. & W. 426. If one's cattle are found on the land of another, and there is no evidence how they came there, he may lawfully enter and reclaim them. *Richardson v. Anthony*, 12 Vt. 273.

25—*White v. Twitchell*, 25 Vt. 620, 60 Am. Dec. 294. So where stone was tortiously taken from defendant's land by plaintiff to build a pier which defendant rightfully abated. *Larson v. Furlong*, 63 Wis. 323.

26—*Nettleton v. Sikes*, 8 Met. 34; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *White v. Ellwell*, 48 Me. 360, 77 Am. Dec. 271; *Schoonover v. Irwin*, 58 Ind. 287.

27—See *Blades v. Higgs*, 10 C. B. (N. S.) 713; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80, and cases cited. *Drury v. Hervey*, 126 Mass. 519, a case of an entry in unreasonable manner to retake an article on breach of condition precedent to complete sale.

28—In *Anthony v. Haney*, 8 Bing. 187, it is intimated by TINDAL, Ch. J., that if the occupant of the freehold refused to deliver up the property, the owner might enter and take it, subject to the payment of any damages he might commit. But if he were liable in damages for the entry, it must be because the entry is unlawful; and in that case it might be resisted.

But if the owner is himself a wrong-doer in leaving his property upon another's land, he must take the consequences of his wrongful act, and cannot, by an unlawful entry, acquire a right to make one that shall be lawful.²⁹

Recaption in Case of Confusion of Goods. The right of recaption may sometimes be exercised under circumstances which give to the party exercising it *not his own merely, but also property of the wrong-doer. When that is permitted it [*56] is of necessity, and because in no other way can practical justice be accomplished. For example, if one purposely or by negligence take a hundred bushels of his neighbor's wheat and commingle it with a hundred bushels of his own barley, so that a separation of the two becomes practically impossible, the law permits the owner of the wheat, in retaking it, to take that which is inseparably commingled with it, since in no other way can he reclaim his own property.³⁰ The inextricable confusion of his goods with the goods of another gives him this right, provided the intermixture was wrongful. But at his option he may refuse the whole and sue for the value of what has been taken from him.

There can be no such absurdity as a right of entry and a co-existent right to resist the entry. The case of *Chambers v. Bedell*, 2 W. & S. 225, 37 Am. Dec. 508, seems to recognize the right of the owner, after the demand and refusal, to enter and take away his property, if he can do so peaceably. Compare *Roach v. Dumron*, 2 Humph. 425. If one removes chattels wrongfully placed on his land he must act so as not unreasonably to injure the wrongdoer; *Burnham v. Jenness*, 54 Vt. 272.

29—*Anthony v. Haney*, 8 Bing 187; *Roach v. Dumron*, 2 Humph. 425; *Crocker v. Carson*, 33 Me. 436; *Blake v. Johnson*, 14 Johns. 406; *Heermance v. Fernoy*, 6

Johns. 5; *Chess v. Keley*, 3 Blackf. 438. One of two tenants in common of a chattel has no right to break into the premises of the other to obtain it. *Herndon v. Bartlett*, 4 Porter, 481; *Crocker v. Carson*, 33 Me. 436. See further, *Hupport v. Morrison*, 27 Miss. 365; *Allen v. Feland*, 10 B. Mon. 306; *Newbold v. Sabler*, 9 Barb. 57; *Chase v. Jefferson*, 1 Houst. 257.

30—2 Kent. 364, 365; *Loomis v. Green*, 7 Me. 386; *Wingate v. Smith*, 20 Me. 287; *Moore v. Bowman*, 47 N. H. 494; *Weil v. Silverstone*, 6 Bush, 698; *Alley v. Adams*, 44 Ala. 609; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Willard v. Rice*, 11 Met. 490, 45 Am. Dec. 226; *Jenkins v. Steanka*, 19 Wis. 139, 88

Suppose, however, that the grain, instead of being different in kind, had all been wheat of the same kind and quality owned severally by the two. In that case, as in the other, separation would have been impossible; but if each were to take from the mass a quantity equal to what he owned when the commingling took place, he would receive, though not exactly his own, yet that which, for all practical purposes, is the equivalent. It would be equal in value, it could be used for the same purposes, and to the senses no difference would be perceptible. To give him back

the equal quantity is therefore to do him justice, unless his [*57] having *been deprived of it for the time has caused him

a special injury, in which case he would be entitled to recover damages for that injury. Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrong-doer the whole, when to restore to the other his proportion would do him full justice, would be a rule wholly out of harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his loss, but also

Am. Dec. 675; *Beach v. Schmultz*, 20 Ill. 185; *Clafin v. Continental Jersey Works*, 85 Ga. 27, 11 S. E. 721; *First Nat. Bank v. Schween*, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174; *Reiss v. Hanchett*, 141 Ill. 419, 31 N. E. 165; *Lance v. Butter*, 135 N. C. 419, 47 S. E. 488; *Brooks v. Lowenstein*, 95 Tenn. 262, 35 S. W. 89. "All the authorities agree, that if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion or any part, of the property, certainly not unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so if the wrongdoer confounds his own goods with goods which he expects may belong to another

and does this with intent to mislead that other and embarrass him in obtaining his right the effect must be the same." *The Idaho*, 93 U. S. 575. If the intermixture is fraudulent the injured party may have the whole. *Jewett v. Dringer*, 30 N. J. Eq. 291. If one buys a stock of goods with fraudulent purpose as against the vendor's creditors, and then purposely or through want of proper care mingles other goods with them, he cannot recover against an officer who levies upon all the goods as the property of the fraudulent vendor. *Sterns v. Herrick*, 132 Mass. 114. See *Lehman v. Kelly*, 68 Ala. 192.

The same principle applies to confusion of accounts. *Diversey v. Johnson*, 93 Ill. 547.

because it would compel the other party to pay not damages but a penalty. The infliction of penalties by way of civil remedy is not favored in the law;³¹ on the other hand the law inclines against them; construing contracts so as to avoid them, and in many cases giving relief against them in equity, where the parties have expressly stipulated for them.³² Therefore, the law in these cases does justice between the parties as nearly as, under the circumstances, is practicable by dividing between them the commingled mass according to their respective proportions.³³ Nor is this method of arranging their interests limited to the cases in *which the commingled mass is exactly the same [*58] with the separate parcels: it is sufficient that it is practically the same, so that the separation of that which is equivalent

31—Willard, Eq. 56; Sanders v. Pope, 12 Ves. 282; Grigg v. Landis, 21 N. J. Eq. 494.

32—Crane v. Dwyer, 9 Mich. 350, 80 Am. Dec. 87; White v. Port Huron, etc. R. R. Co., 13 Mich. 256; Wing v. Railey, 14 Mich. 83; Jaquith v. Hudson, 5 Mich. 123; Grigg v. Landis, 21 N. J. Eq. 494; McKim v. The White Hall Co., 2 Md. Ch. Dec. 510; Skinner v. Dayton, 2 Johns. Ch. 526; Skinner v. White, 17 Johns. 357; Livingstone v. Tompkins, 4 Johns. Ch. 510, 8 Am. Dec. 598; Cythe v. La Fontaine, 51 Barb. 186; Baxter v. Lansing, 7 Paige, 350; Laurea v. Bernauer, 33 Hun, 307; Hager v. Buck, 44 Vt. 285; Walker v. Wheeler, 2 Conn. 299; Bowen v. Bowen, 20 Conn. 126; Warner v. Bennett, 31 Conn. 468; Horsburg v. Baker, 1 Peters, 239; Smith v. Jewett, 40 N. H. 530; Bradstreet v. Baker, 14 R. I. 546; St. Louis, etc. Ry. Co. v. Shoemaker, 27 Kan. 677; Scofield v. Tompkins, 95 Ill. 190, 35 Am. Rep. 160; Bolster v. Post, 57 Ia. 698; Sanders v. Pope, 12 Vesey, 282; Davis v. West, Id. 475; North-

cote v. Duke, Amb. 511; Storey's Eq. Jur. Sec. 1319; Willard's Eq. Jur., 56.

33—Lufton v. White, 15 Ves. 442; Spence v. Union Marine Ins. Co., L. R. 3 C. P. 427; Ryder v. Hathaway, 21 Pick. 298; Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233; Moore v. Bowman, 47 N. H. 494; Willard v. Rice, 11 Met. 493, 45 Am. Dec. 226; Bryant v. Ware, 30 Me. 295; Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; Holbrook v. Hyde, 1 Vt. 286; Adams v. Myers, 1 Sawyer, 306; Wilkinson v. Stewart, 85 Pa. St. 255; Chandler v. DeGraff, 25 Minn. 88; Stone v. Quaal, 36 Minn. 46; Claffin v. Continental Jersey Works, 85 Ga. 27, 11 S. E. 721; Reid v. King, 89 Ky. 388, 12 S. W. 772; Keweenaw Ass. v. O'Neil, 120 Mich. 270, 79 N. W. 183; Osborne v. Cargill El. Co., 62 Minn. 400, 64 N. W. 1135; Peterson v. Polk, 67 Miss. 163, 6 So. 615; First Nat. Bank v. Scott, 36 Neb. 607, 54 N. W. 987; Pickering v. Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698. "The

in quantity or measure will give to the party whose property has been wrongfully taken that which is substantially equivalent in kind and value. This rule has been applied to the case of quantities of saw-logs, belonging to different parties but commingled together; and it is held that to give the party whose logs are lost the option of taking from the mass an equivalent in quantity and quality, or of demanding the value, is all that in justice he can require.³⁴ It is said in one case that, in order that the plaintiff may recover the whole where his own property has been confused with the defendant's, the defendant must have acted fraudulently in causing the intermixture, and the plaintiff's

general rule that governs cases of intermixture does not apply where the goods intermingled remain capable of identification, nor where they are of the same quality and value, as where guineas are mingled or grain of the same quality. Nor does the rule apply where the intermixture is accidental, or even intentional if it is not wrongful." The Idaho, 93 U. S. 575.

34—Stephenson v. Little, 10 Mich. 433; Jenkins v. Steanka, 19 Wis. 126, 88 Am. Dec. 675; Ryder v. Hathaway, 21 Pick. 298; Hessel-tine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; Smith v. Morrill, 56 Me. 566; McDonald v. Lane, 7 Can. S. C. R. 462. This paragraph of the text is quoted and approved in Bonaparte v. Clagett, 78 Md. 87, 27 Atl. 619. If the goods can be distinguished or separated, no change, of course, takes place in the property. Alley v. Adams, 44 Ala. 60; Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233. There can be no commixture or confusion of goods in the legal sense when logs plainly marked with certain initials are mingled in a boom with other logs not so

marked. Goff v. Brainerd, 58 Vt. 468. If they are intermingled by consent, the parties become tenants in common of the mass. Adams v. Myers, 1 Sawyer, 306; Ryder v. Hathaway, 21 Pick. 299; Low v. Martin, 18 Ill. 286. See, Hance v. Tittabawassee Boom Co., 70 Mich. 227, 38 N. W. 228. The same is true where they are intermixed by accident. Moore v. Erie R. R. Co., 7 Lans. 39. When the only practicable method of conducting the business of pork packing is to render to each bailor of hogs an amount of the product equivalent in kind and quality to the amount delivered, not the animals *in specie*, the bailee may rightfully act according to such method. Morningstar v. Cunningham, 110 Ind. 328, 59 Am. Rep. 211.

If one allows his goods to be intermingled with those of another, knowing that sales are to be made from the mass, he cannot retake his own from a purchaser in good faith; Foster v. Warner, 49 Mich. 641, or hold such purchaser for a conversion; Preston v. Wither-spoon, 109 Ind. 457, 58 Am. Rep.

rights must otherwise be incapable of complete protection.^{34a} In all cases of wrongful intermixture of goods, doubts as to the amount each is entitled to will be resolved against the party at fault.³⁵

Property by Accession. In another class of cases the owner of property may either lose it by the wrongful act of another, or he may be entitled to reclaim it in a modified or perhaps wholly different form. The reason why the owner is permitted to reclaim his own property from a wrong-doer is, that the protection of property and the peace of society are *inconsistent with a state of the law in which a wrong-doer may compel another to sell to him, by seizing the property he desires and leaving the owner to bring suit for its value. Therefore, in general, the owner of property, so long as he can trace and identify his own, may reclaim it. But there are some cases in which he is not permitted to reclaim his own, even though the identification be complete.

In illustration of some of these cases the instance may be given of a stone or board belonging to one man taken by another and built into his house in such a manner that it could not be removed without inflicting injury out of proportion to the value of the stone or board. In such a case the law would not suffer the original owner to reclaim it, but would leave him to his remedy in the recovery of damages, and treat the stone or board as having become a part of the realty by accession. A like loss of property to the original owner might follow where one has taken the personal property of another and expended upon it labor or money of his own, thereby converting it into something

417. A loss of wheat in an elevator occurring without fault of the depositors must be born rateably by them; *Brown v. Northcutt*, 14 Ore. 529. Am. Dec. 627; *Thorne v. Colton*, 27 Iowa, 425; *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653; *Hart v. Morton*, 44 Ark. 447; *Davis v. Krum*, 12 Mo. App. 279.

As to an intermixture where the party chargeable with it is innocent of intended wrong, see *Bryant v. Ransom*, 20 Vt. 383; *Hesseltine v. Stockwell*, 30 Me. 257, 50

34a—*Wright v. Skinner*, 34 Fla. 453, 16 So. 335.

35—*Osborne v. Cargill El. Co.*, 62 Minn. 400, 64 N. W. 1135.

substantially different, or adding so greatly to its value that, to permit the original owner to reclaim it, would be shocking to one's sense of justice.

If one has willfully, as a trespasser, taken the property of another and altered it in form or substance by an expenditure of his own labor or money, he will not be suffered to acquire a title by his wrongful action as against the original owner reclaiming his property. Therefore, one whose trees have been converted into shingles by a trespasser may reclaim his property in the shingles,³⁶ or if they have been made into the frame of a boat, he may have them in that form.³⁷ Indeed, the doctrine has been carried so far that in New York it has been held that one whose grain has been taken by a willful trespasser and converted into alcoholic liquors is entitled to demand and recover the new product.³⁸ The cases arise mostly when trees or minerals are severed from the land by a trespasser. In such case the property severed still belongs to the owner of the land and he may reclaim it wherever found and in whatever condition it may be at the time, subject to the exception hereafter noted.³⁹ This being true it would seem to follow that, if the owner brings trover, he should be entitled to recover the value of the property at the time of

36—*Church v. Lee*, 5 Johns. 348. See, also, *Curtis v. Groat*, 6 Johns. 108; *Worth v. Northam*, 4 Ired. 102.

37—*Burris v. Johnson*, 1 J. J. Marsh, 196. Trees into railroad ties; *Strubbee v. Trustees*, 78 Ky. 481. If timber is cut by trespasser, not by one in adverse possession, trover will lie so long as it can be identified. *Street v. Nelson*, 80 Ala. 230. The following cases also support the text: *McKinnis v. Railway Co.*, 44 Ark. 210; *Stotts v. Brookfield*, 55 Ark. 307, 18 S. W. 179; *Eaton v. Langley*, 65 Ark. 448, 47 S. W. 123, 47 L. R. A. 474; *Central Coal & Coke Co. v. John Henry Shoe Co.*, 69 Ark. 302, 63 S.

W. 49; *Powers v. Tilley*, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; *Keweenaw Ass. v. O'Neil*, 120 Mich. 270, 79 N. W. 183; *Peterson v. Polk*, 67 Miss. 163, 6 So. 615; *Hughes v. United Pipe Lines*, 119 N. Y. 423, 23 N. E. 1042; *Holt v. Hayes*, 110 Tenn. 42, 73 S. W. 111; *United States v. Homestake Min. Co.*, 117 Fed. 481, 54 C. C. A. 303.

38—*Silisbury v. McCoon*, 3 N. Y. 379. See *Riddle v. Driver*, 12 Ala. 590.

39—See cases cited in last three, and in following notes.

demand, without any deduction for the labor and expense of the defendant in severing, transporting and preparing the property for market; and some of the cases so hold.⁴⁰ Other cases hold that this rule only applies where the trespass is willful and that, when the trespass is by mistake and innocent, the owner is only entitled to recover the value of the property as part of the realty, or immediately after severance.⁴¹

40—*White v. Yawkey*, 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199; *Powers v. Tilley*, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; *Gates v. Rifle Boom Co.*, 70 Mich. 309, 38 N. W. 245; *Moret v. Mason*, 106 Mich., 340, 64 N. W. 193; *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813. In *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238, where timber was cut on the plaintiff's land and made into spool stock, in which condition it was converted by the defendant, the court says: "The law neither divests him of his property nor requires him to pay for improvements made without his authority. It is only where the identity of the original material has been destroyed, or its value insignificant compared with the article manufactured from it, that the law is otherwise. To say that the owner may retake the property in an action of replevin in an improved state, as all the authorities hold, and yet that he may not, when he sees fit to resort to an action of trover, recover the equivalent in damages, is a subtlety too refined to be adopted in ordinary affairs of business transactions." P. 394.

41—*Birmingham Mineral R. R. Co. v. Tenn. Coal, etc. Co.*, 127 Ala. 137, 28 So. 679; *Ivy Coal & Coke Co. v. Ala. Coal & Coke Co.*, 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46; *Eaton v. Langley*, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474; *St. Claire v. Cash Gold M. & M. Co.*, 9 Colo. App. 235, 47 Pac. 466; *Wright v. Skinner*, 34 Fla. 453, 16 So. 335; *Donovan v. Consolidated Coal Co.*, 187 Ill. 28, 53 N. E. 290, 79 Am. St. Rep. 206; *Thomas Pressed Brick Co. v. Herter*, 60 Ill. App. 58; *Sunnyside Coal & Coke Co. v. Reits*, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; *Kentucky & Ind. Cement Co. v. Morgan*, 28 Ind. App. 89, 62 N. E. 68; *Guarantee, etc. Co. v. Drew Investment Co.*, 107 La. 251, 31 So. 736; *Anderson v. Besser*, 131 Mich. 481, 91 N. W. 737; *Whitney v. Huntington*, 37 Minn. 197, 33 N. W. 561; *King v. Merriman*, 38 Minn. 47, 35 N. W. 570; *Peterson v. Polk*, 67 Miss. 163, 6 So. 615; *Bond v. Griffin*, 74 Miss. 599, 22 So. 187; *Illinois Cent. R. R. Co. v. Le Blanc*, 74 Miss. 626, 21 So. 748; *Dyke v. National Transit Co.*, 22 App. Div. 360, 49 N. Y. S. 180; *Holt v. Hayes*, 110 Tenn. 42, 73 S. W. 111; *United States v. Homestake Min. Co.*, 117 Fed. 481, 34 C. C. A. 303. In *Dougherty v. Chesnutt*, 86 Tenn. 1, 5 S. W. 444, where the defend-

"It is on all hands conceded where the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended upon it which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant as compared with the value of the new product, the title to the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is so to adjust the rights of the parties as to save both, if possible, or as nearly as possible, from any loss. But where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush.⁴² Perhaps no case has gone further than *Wetherbee v. Green*,⁴³ in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of twenty-five dollars, and converted them into hoops worth seven

ant quarried marble from the plaintiff's land and cut and dressed it for market, it was held that, in a suit in equity, the plaintiff was entitled to recover the value of the marble as cut and dressed, less the actual, but not exceeding the usual and reasonable cost, of quarrying, cutting and dressing the marble. And see *Eaton v. Langley*, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474. And see p. *536-7, *post*.

As to the damages recoverable from one who purchases from the trespasser, see *Central Coal & Coke Co. v. John Henry Shoe Co.*, 69 Ark. 302, 63 S. W. 49; *Wright*

v. Skinner, 34 Fla. 453, 16 So. 335; *Powers v. Tilley*, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; *Whitney v. Huntington*, 37 Minn. 197, 33 N. W. 561; *King v. Meriman*, 38 Minn. 47, 35 N. W. 570; *Holt v. Hayes*, 110 Tenn. 42, 73 S. W. 111; *Fisher v. Brown*, 70 Fed. 570, 17 C. C. A. 225; *Railway Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. Rep. 629; *Strubbee v. Trustees*, 78 Ky. 481, 39 Am. Rep. 251.

42—This qualification has been questioned in *Ky. Strubbee v. Trustees*, 78 Ky. 481, 39 Am. Rep. 251.

43—22 Mich. 311, 7 Am. Rep. 653.

hundred dollars, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established."⁴⁴ The Supreme Court of Arkansas, in considering whether the title in such case should be declared in the

44—*Isle Royal Mining Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 520. In this case parties, by mistake, had felled trees on the land of another and cut them into cord wood. The owner of the trees then seized the wood and sold it. The parties cutting it thereupon brought suit in assumpsit, claiming that they were entitled to recover either the value of the wood, as having been made their own by the labor expended on it or the value of their labor, which the owner of the trees had now appropriated. By the court: "There is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and hoops in *Wetherbee v. Green*. The trees are not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut. The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed as a rule that a man prefers his trees cut into cord wood rather than left standing, and if his right to leave them uncut is interfered with, even by mistake, it is manifestly just that

the consequences should fall upon the person committing the mistake and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others if such were the law? Whether mistaken or not is all the same to him, for in either case he has his employment and receives his remuneration, while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.

"A case could seldom arise in which the claim for compensation could be more favorably presented by the facts than it is in this, since it is highly probable that the defendant would suffer neither hardship nor inconvenience if compelled to pay the plaintiffs for their labor. But a general principle is to be tested, not by its operation in an individual case, but by its general workings. If a mechanic employed to alter over one man's dwelling-house shall by mistake go to another which happens to be unoccupied, and before his mistake is discovered, at a

trespasser, says: "His right to the property in its new form should not, therefore, in any case be dependent upon its increased value, but upon the relative values of the original materials and his expenditures upon the same; and this should be considered only when the identity of the original article is susceptible of being traced; and then only when he has acted in good faith and converted it into something substantially different, and the value of the original article, as compared with the value of that expended upon it, is so insignificant as to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush? In addition to the relative values the injury inflicted upon the owner by the trespasser, and the injustice of taking from the former his property, against his will, at its market value, should be considered and compared with the hardship the latter may suffer by the loss of his labor and other expenditures, in determining whether this appropriation would be such gross and palpable injustice as to give the innocent trespasser the right to the property in its converted form."⁴⁵

[*61] ***Entry upon Lands to Repossess them.** Of the same nature as the right of recaption is the right which the owner of lands has, when another is wrongfully in possession thereof, to re-enter when he may do so peacefully, and thereafter to exclude the wrong-doer therefrom. This right may exist either where one has gone into possession without right, or where one,

large expenditure of labor, shall thoroughly overhaul and change it, will it be said that the owner, who did not desire his house disturbed, must either abandon it altogether, or if he takes possession must pay for labor expended upon it which he neither contracted for nor desired nor consented to? And if so, what bounds can be prescribed to which the application of this doctrine can be limited? The man who by mistake carries off the property of another will next

be demanding payment for the transportation; and the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against anything being accidentally improved by another at his cost and to his ruin." See, also, *Gates v. Rifle Boom Co.*, 70 Mich. 309, 38 N. W. Rep. 245.

45—*Eaton v. Langley*, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474.

having had an estate in, or at least lawful possession of the lands, has had his right terminated by operation of law or by the act of the owner.⁴⁶ The chief restraint upon this remedy is sufficiently indicated by what has already been said; it must be had in a peaceful manner, and an actual possession, *though wrongful, must not be subverted by the employment of [*62] force.⁴⁷

Distress of Cattle Damage Feasant. If the cattle of one man stray upon the lands of another, thereby causing him damage, he may distrain and hold them until the damage is estimated and satisfied.⁴⁸ This is a common law right, and is regulated by statute. The distress consists in taking the cattle into custody while they are still upon the lands, and impounding them until satisfaction is made. For the protection of the owner, notice to him of the distress is required, and if the compensation is not agreed upon, disinterested appraisers are chosen to assess it. The detention of the cattle is only for the purpose of indemnity, and they must be surrendered when satisfaction is made. In the meantime the distrainer must feed and care for them properly; but if they die or are injured or lost, without his fault, the loss must fall upon the owner.⁴⁹

46—*Taunton v. Costar*, 7 T. R. 431; *Turner v. Meymott*, 1 Bing. 158; *Argent v. Durrant*, 8 T. R. 403; *Barnes v. Dean*, 5 Watts. 543, Am. Dec. 346; *Thompson v. Craigmyle*, 4 B. Mon. 391, 41 Am. Rep. 240; *Sharon v. Wooldrick*, 18 Minn. 355; *Clower v. Maynard*, 112 Ga. 340, 37 S. E. 370; *Brebach v. Johnson*, 62 Ill. App. 131; *Mead v. Pollock*, 99 Ill. App. 151; *Stillwell v. Duncan*, 103 Ky. 59, 44 S. W. 357, 39 L. R. A. 863; *Lyon v. Fairbank*, 79 Wis. 455, 48 N. W. 492, 24 Am. St. Rep. 732. See *Bristor v. Burr*, 120 N. Y. 427, 24 N. E. 937.

47—See *post*, Ch. X.

48—*McKeen v. Converse*, 68 N. H. 173, 39 Atl. 435; *McPherson v. James*, 69 Ill. App. 337.

49—*Pettit v. May*, 34 Wis. 666; *Taylor v. Welbey*, 36 Wis. 42; *Mosher v. Jewett*, 59 Me. 453; *S. C. 63 Me. 84*; *Rust v. Low*, 6 Mass. 90; *Melody v. Reab*, 4 Mass. 471; *Eames v. Salem & Lowell R. R. Co.*, 98 Mass. 560, 96 Am. Dec. 676; *Ladue v. Branch*, 42 Vt. 575. Property cannot be distrained which, at the time, is in the actual possession of the owner. *Storey v. Robinson*, 6 T. R. 138; *Field v. Adames*, 12 Ad. & El. 649. The statutory lien may be waived and an action brought against the owner. *Prather v. Reeve*, 23 Kan. 627; *Keith v. Til-*

The right to distrain cattle *damage feasant* may be affected by statutory regulations making it the duty of the owner of the land to enclose his premises with a fence sufficient for their protection.⁵⁰ Where the right is regulated by statute, the statute must be strictly complied with.^{50a} Where adjoining owners are required by law to construct and maintain respectively a certain portion of the partition fence between them, and one neglects this duty and the cattle of the other enter his premises in consequence, he is precluded from maintaining an action, because the default from which the injury flows is his own.⁵¹ But as the obligation in such a case is only imposed for the protection of those whose beasts may be lawfully on the adjoining lands, [*63] if cattle *pass upon such adjoining lands, and from thence pass upon the premises insufficiently fenced, the owner of such premises is not precluded from a recovery of his damages.⁵²

ford, 12 Neb. 271; *Triscony v. Brandenstein*, 66 Cal. 514. If an animal taken damage feasant is let go, it cannot afterward be taken for that act. *Buist v. McCombe*, 8 Ont. App. 598. If the owner refuses to pay the damage claimed and neglects to have a statutory appraisalment, trover will not lie for refusal to deliver. *Norton v. Rockey*, 46 Mich. 460.

50—*Little v. Swafford*, 14 Ind. App. 7, 42 N. E. 245; *Northcott v. Smith*, 4 Ohio C. C. 565.

50a—*Jones v. Clouser*, 114 Ind. 387, 16 N. E. 797.

51—*Shepherd v. Hees*, 12 Johns. 433; *Colden v. Eldred*, 15 Johns. 220; *Stafford v. Ingersoll*, 3 Hill, 38; *Cowles v. Balzer*, 47 Barb. 562; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 260, 49 Am. Dec. 239; *Akers v. George*, 61 Ill. 376; *Milligan v. Wehinger*, 68 Pa. St. 235; *Griffin v. Martin*, 7 Barb. 297; *Roach v. Lawrence*, 56 Wis. 478; *Mann v. Williamson*, 70 Mo.

661; *D'Arcy v. Miller*, 86 Ill. 102. As to liability where only part of the plaintiff's fence is lawful, see *Noble v. Chase*, 60 Ia. 261. That stock is prohibited from running at large does not relieve one of the duty of fencing. *Duffees v. Judd*, 48 Ia. 256. Nor that owner knows his animal is vicious. *Runyan v. Patterson*, 87 N. C. 343. Nor that cattle came upon land from unenclosed field. *Fillmore v. Booth*, 29 Kan. 134. The rules of liability are the same where fence is maintained, under agreement in part by each owner. *Scott v. Grover*, 56 Vt. 499, 48 Am. Rep. 814; *Baynes v. Chastain*, 68 Ind. 376; *Hinshaw v. Gilpin*, 64 Ind. 116. See *Dent v. Ross*, 52 Miss. 138, and cases pp. *399, *400, *post*.

52—*Lord v. Wormwood*, 29 Me. 282; *Lyons v. Merrick*, 105 Mass. 71; *Johnson v. Wing*, 3 Mich. 163, and cases pp. *399-*401, *post*. Statutes on this subject do not usually go further than to take away the

Distress of Goods to Compel Performance of Duty. In several cases where an obligation, owing to a party, remained unperformed, the common law permitted him to enforce performance by seizing the goods and chattels of the party in default, and holding them until performance. If performance was not made in reasonable time after seizure, it also permitted him, under proper regulations, to sell the distress. The most common of these cases was that of the non-payment by a tenant of his rent; and this is the only one which has any place in the law of this country. All movable articles which are the subject of property are liable to be seized for rent, including even the chattels of other persons which chance to be in the tenant's possession with the owner's permission; but with this important exception, that articles held by him in the way of trade such as goods of a guest in possession of an inn-keeper, and goods in the hands of a mechanic to be made up or repaired, are privileged for the encouragement of business. And whatever is for the moment in the personal use of the tenant is also, while so used, privileged.⁵³ And *now, by statute, in this country, this right [*64] of distress is in the main taken away; and where not taken away, it is regulated by statute. A consideration of it does not properly belong to our subject.

Redress by Action. From the foregoing statement of the law it will appear that the privilege of redressing one's own wrongs is not to any great extent permitted to individuals; indeed, the State cannot afford to clothe individuals with its own powers for the purpose of enforcing its laws according to their own judg-

right of action where the owner of lands neglects to enclose them with a proper fence and they are trespassed upon in consequence. He may, therefore, dispense with a fence if he sees fit to leave his premises open to cattle lawfully on the premises which adjoin them. *Aylesworth v. Herrington*, 17 Mich. 417. As to liability where cattle run at large in an

enclosure occupied in common by two or more. See *Montgomery v. Handy*, 62 Miss. 16; *Cole v. State*, 72 Ala. 216.

53—See 1 Bl. Com. 8 and notes. *Home Sewing Machine Co. v. Sloan*, 87 Pa. St. 438; *Kleber v. Ward*, 88 Pa. St. 93; *Kennedy v. Lange*, 50 Md. 91; *Bird v. Anderson*, 41 N. J. L. 392.

ments, especially when in enforcing the laws they would only be judging of and redressing their own grievances. Order is no less the law of human governments than of the divine government, and individual convenience must be subordinated to it. The cases which are above mentioned are in the main to be regarded as cases in which the individual is permitted to act on his own behalf, in order that he may prevent a mischief already begun from becoming more serious. He interposes obstructions to the lawless conduct of others, he protects his person, he reclaims his property; but only on the condition that he can do so without a breach of the public peace; and he abates a nuisance on the same terms. But to obtain redress for any wrong done him he must invoke the assistance of the law.

Nature of the Legal Redress. The redress the law will give will be suited to the injury suffered. If one's land is taken from him, he shall have the proper writ for its recovery. If personal property is taken which he prefers to recover rather than have judgment for its money value, he may demand back the thing itself. But the principal remedy, and for the most part the only available remedy which the law can give for a wrong, is an award of money estimated as an equivalent for the damage suffered.

How One Becomes a Wrong-Doer. The ways in which one may become liable to an action as for tort are the following:

1. By actually doing to the prejudice of another something he ought not to do.
2. By doing something he may rightfully do, but wrongfully or negligently doing it by such means or at such time or in such manner that another is injured.
3. By neglecting to do something which he ought to do, whereby another suffers an injury.

[*65] *The first is the active wrong; the others are usually the wrongs of negligence.

The active wrong may be done by the party in person, or it may be done by some other person for whose conduct generally or under the particular circumstances he is responsible. He is always responsible for the conduct which he counsels, advises or directs, and for whatever naturally results from his counsels.

That is his wrong which he thus accomplishes through another. Without more than a passing allusion in this place to rules which will receive attention hereafter, it may be stated that the common law holds the husband civilly responsible for the conduct of his wife, the two in law being considered as one person for the purposes of legal redress. They are to be joined in the suit, but the judgment, if one is recovered, may be collected of the husband, and it is immaterial that he never advised the wrong, or that it may have been unknown to him, or against his will. The idea underlying this doctrine is, not that the husband is necessarily in fault, but that the interests of society are best subserved by maintaining the principle of marital unity. Another case of responsibility for the acts of others is that of the master, who, in general, must redress all wrongs negligently committed by servants or others to whom he may have entrusted his business, and who is also responsible for their active wrongs, such as frauds and deceits, which are committed in the line of his business and with his actual or presumed authority. So the magistrate may be responsible for illegally setting the constable in motion; the plaintiff who is back of him may be responsible for the acts of both; the sheriff may be holden for the conduct of his deputy, and so on. If the position of the parties is such relatively that the particular act must be considered as having been, in contemplation of law, advised, counseled, or procured to be done by another, it may be treated as the tort of the party who thus counsels, advises and procures, and he is liable as if he had done it in person.

The wrong may also be done by one person or by several, but when by more than one, it is the several act or neglect of all. It may also be suffered by several, where they have joint interests which are invaded, as where they are joint owners of property, or are partners.

***Acts Merely Intended.** An act contemplated but not [*66] yet accomplished, though it may sometimes be ground for preventive remedies, cannot support an action as for a tort. A tort supposes a wrong actually committed, and this implies a right invaded, or in some manner hindered or abridged. The

mere intent cannot constitute actionable matter.⁵⁴ A malicious person may purpose to libel his rival in business; he may have the libel prepared, put in print ready for dissemination among the people, have messengers ready for its distribution, so that the evil intent and the deliberate purpose to do mischief are manifested in a manner most emphatic and conclusive; but if no other person has yet seen the libel there is no wrong, because the reputation is not yet assailed, and the right of the party to protection in it is therefore not yet violated. It is only assailed when a publication is made. All that precedes the publication rests in intent, and intent may be overcome by repentance, or accident or the interposition of others may prevent its being carried into effect. Any degree of preparation for a tort can never constitute a tort; if the wrong is prevented there is certainly no wrong suffered.

Elements of a Tort—Concurrence of Wrong and Damage. It is said by the authorities that it is the conjunction of damage and wrong that creates a tort, and there is no tort if either [*67] damage or wrong is wanting.⁵⁵ Here *the word wrong is used in the sense of a thing amiss; something which for any reason the party ought not to do or to permit, and which

54—*Sheple v. Page*, 12 Vt. 519; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Herron v. Hughes*, 25 Cal. 555; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Jones v. Baker*, 7 Cow. 445.

55—*Waterer v. Freeman*, Hob. 266. "If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title two things must concur; damage to himself and a wrong committed by the other party." *BAILEY, J.*, in *Rex v. Pagham*, 8 B. & C. 362. *Day v. Brownrigg*, L. R. 10 Ch. D. 294; *Street v. Union Bank*, L. R. 30 Ch. D. 156; *Knapp v. Roche*, 94 N. Y. 329; *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728; *Nat. Cop-*

per Co. v. Minn. etc. Co. 57 Mich. 83. Distinction between injury and damage stated; *North Vernon v. Voegler*, 103 Ind. 314. The pollution of a "stream affords," says *Fry, J.*, "a very clear illustration of the difference between injury and damage; for the pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is injury without damage, which would become at once both injury and damage on the cessation of other pollutions." *Pennington v. Brinsop, etc. Co.* L. R. 5 Ch. D., 769. As one has no right to a gratuity by will, he can main-

does not become the actionable wrong called a tort unless the other element is found in the same case, namely, a damage suffered in consequence of the thing amiss. In this sense we shall frequently be compelled to make use of the word wrong, though it may sometimes be confusing to do so. This is one of the inconveniences which follow from employing a word which signifies a quality to designate a class of cases in which, in its ordinary sense, it is only an element, while it is equally applicable to numerous other cases which are not so classed.

Although damage is a necessary element in an actionable wrong, it is sometimes damage merely implied or presumed; not damage shown. There are many cases in which, in point of fact, a showing of pecuniary damages is impossible, and some where it would be easy to show that none had been sustained, in which, nevertheless, the law adjudges that a tort has been committed. Illustrations might be found in the law of libel. Any person of ordinary information would perhaps be able to name some man of high national reputation, perhaps in public life, perhaps at the bar, or in some other walk of private life, who, during a long and honorable career, had been conspicuous for the purity of his life and for an unblemished reputation, until he had acquired a hold upon the public confidence which no assault could weaken. Let it be supposed now that one is inspired by malice to attack such a reputation, and make it the target for the most preposterous libels. Here is a wrong clearly, a thing amiss; but if we question ourselves concerning its probable effect, the instinctive

tain no action against another who, by falsehood or otherwise, induces the revocation of a will in his favor. *Hutchins v. Hutchins*, 7 Hill, 104. A man who had intended to publish a directory abandoned his intention by reason of defendant's false representations to his patrons that he would not publish. Held that he was without remedy as an intention is not property; *Dudley v. Briggs*, 141 Mass. 582.

That injury without damage is not actionable, see *Ming v. Woolfolk*, 116 U. S. 599; *Raynsford v. Phelps*, 49 Mich., 315; *Thomas v. Birmingham Canal Co.*, 49 L. J. (Q. B. D.), 851; *Wittich v. First Nat. Bank*, 20 Fla. 843, 51 Am. Rep. 631; *Gilcrist v. Nautker*, 42 Neb. 564, 60 N. W. 906; *Commercial Union Ass. Co. v. Shoemaker*, 63 Neb. 173, 88 N. W. 156; *Carpenter Paper Co. v. News Pub. Co.*, 63 Neb. 59, 87 N. W. 1050.

answer is, it does not in the least damage the object of this vituperation; it may give the public a sense of outrage, but the only person actually injured is the person attacking, not the one attacked. The former would be rendered infamous, the latter would be unaffected, except as the *effort to defame his [*68] character would be likely to elicit in his behalf evidences of public sympathy and regard. But if he were to feel impelled by a sense of duty to bring suit for the publication, he would not only be held entitled to substantial damages, but the assessment of these would probably be all the more severe because of the impregnable position occupied in the public confidence by the libeled party, which, although it precluded actual damage, at the same time rendered the moral quality of the assault more atrocious.

A more simple case may be that of the man who has entered the field of another for the purpose of plunder, but been frightened away before the mischief was accomplished. Assuming, in such a case, the impossibility of showing the slightest actual injury, the trespasser is nevertheless held liable to pay damages. The ground of liability is, that from every distinct invasion of right, some damage is presumed; and the law therefore makes some award, though no damages are proven, and none are susceptible of proof.⁵⁶ If the reason for this is sought for, we are

56—Ashby v. White, 2 Ld. Raym., 938, 955; Herring v. Finch, 2 Lev. 250; Hunt v. Dorman, Cro. Jac. 478; S. C. 2 Roll. R. 21; Weller v. Baker, 2 Wils. 414; Wells v. Watling, 2 W. Black. 1233; Blofield v. Payne, 4 B. & Ad. 410; Wood v. Waud, 3 Exch. 748; Barker v. Green, 2 Bing. 317. "Actual, perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right in which the law will presume damage." Parke, B. in Embury v. Owen, 6 Exch. 353, 368. "I am not able to understand how it can correct-

ly be said in a legal sense that an action will not lie even in case of a wrong or violation of a right, unless it is followed by some perceptible damage which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable." * * "Actual, perceptible damage is not indispensable as a foundation of an action. The law tolerates no further inquiry than whether there has been a violation of a right." STORY, J., in Webb v. The Portland Manufacturing Co., 3 Sumner, 189, 192. See, also, Williams, v. Esling, 4 Penn. St. 486,

not left in perplexity or doubt. The method chosen for the protection of rights being an action for the recovery of damages for their invasion, it is manifest that when a party is convicted of the invasion, the conviction must be *followed by some consequences disagreeable to himself, or it could not possibly operate as a restraint. As damages are the only penalty which the law provides for the commission of a tort, it is obvious that a recovery of these must be allowed in every case in which a wrong is committed, or those wrongs for which no damages are awarded will be committed with impunity. Subject every man to the necessity of pointing out in what manner a trespass had caused him a pecuniary injury, and for many of the most vexatious there might be no redress and for the rights invaded no protection. Under such a rule the eavesdropper might with impunity invade the privacy of one's home, by listening at key-holes and playing the spy at windows, since acts like these, however annoying and reprehensible, could not in any manner tend to impoverish the family, or deprive them of food, or drink, or clothing, or diminish their current revenue.

Lord HOLT has endeavored to express the legal foundation of recovery in these cases as follows: "The damage is not merely pecuniary, for if a man gets a cuff on the ear from another, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal damage."⁵⁷

The idea here is, that it is a damage in contemplation of law

45 Am. Dec. 710; *Whittemore v. Cutter*, 1 Gall. 429; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Woodman v. Tufts*, 9 N. H. 88; *Bassett v. Salisbury Manufacturing Co.*, 28 N. H. 438, 455; *Tillotson v. Smith*, 32 N. H. 90; *Blodgett v. Stone*, 60 N. H. 167; *Lafin v. Willard*, 16 Pick. 64; *White v. Griffin*, 4 Jones, L. 139; *Dixon v. Clow*, 24 Wend. 191. *Chapman v. Copeland*, 55 Miss. 467; *Blanchard v. Burbank*, 16 Ill. App. 375; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631; *Lance v. Apgar*, 60 N. J. L. 447, 38 Atl. 695. When a right is violated an action lies, though the result may be beneficial to the plaintiff, it being as illegal to force one to receive a benefit as to submit to an injury. *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631. (Court of Errors and Appeals.)

57—*Ashby v. White*, 2 Ld. Raym. 938; 955; S. C. 1 Smith Lead. Cas. 425.

though followed by neither loss nor pain, because the man's right to personal security has been invaded. As is, perhaps, better expressed by BULLER, J., in another case, an action may be supported because "the right has been injured."⁵⁸ And here there is no room for the application of that oft quoted but little understood maxim *de minimis non curat lex*. It is a maxim that may usefully be applied where a party demands that which is insignificant for mere purposes of vexation,⁵⁹ but it "is not an applicable answer to an action for violating a clear right."⁶⁰ The

law must regard the substantial rights of parties, *though [*70] it may overlook trivial and unimportant matters in giving redress.⁶¹ Therefore, slight errors in computation may be overlooked, though they may exceed the actual damages flowing from a distinct and palpable wrong, where the maxim, if applied, might inflict incalculable injury.⁶²

The necessity for the protection of the right requiring a pre-

58—Hobson v. Todd, 4 T. R. 71, 73. "Here," says this judge, "is a wrongdoer, and the plaintiff is entitled to an action without proving any specific damages." "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount." Lord DENMAN, Ch. J., in Clifton v. Hooper, 6 Q. B. 468. See Fray v. Voules, 1 El. & El. 839, in which an attorney was held liable for compromising a suit, contrary to the instructions of his client, and it was held to be no answer, that the compromise was reasonable and *bona fide*, and for the benefit of the client.

59—Hickey v. Baird, 3 Mich. 32.

60—MULLETT, J., in Ellicottville, etc., Plank Road Co. v. Buffalo, etc., R. R. Co., 20 Barb. 644, 651. See *Ex parte* Becker, 4 Hill, 613; Hall v. Fisher, 9 Barb. 17, 29;

Schnable v. Koehler, 28 Pa. St. 181; Kidder v. Barker, 18 Vt. 454; Graver v. Sholl, 42 Pa. St. 58; Case v. Dean, 16 Mich. 12; Wartman v. Swindell, 54 N. J. L. 589, 25 Atl. 356, 18 L. R. A. 44.

61—Smith v. Gugerty, 4 Barb. 614, 620; Boyden v. Moore, 5 Mass. 365; Pindar v. Wadsworth, 2 East. 154; Billingsley v. Groves, 5 Ind. 553; Kemp v. Harmon, 11 Ind. 311; Zehner v. Taylor, 15 Ind. 70.

62—*Ex parte* Becker, 4 Hill, 613. See, further, Fullam v. Stearns, 30 Vt. 445; Ripka v. Sergeant, 7 W. & S. 9, 42 Am. Dec. 214; Hathorn v. Stinson, 12 Me. 183; Dixon v. Clow, 24 Wend. 188; Cowles v. Kidder, 24 N. H. 359, 57 Am. Dec. 287; Jewett v. Whitney, 43 Me. 242; Munroe v. Gates, 48 Me. 463; Champion v. Vincent, 20 Texas, 811; Smethurst v. Journey, 1 Houst. 196; Woolsey v. Judd, 4 Duer, 596, 599; Marzetti v. Williams, 1 B. & Ad. 415; The Reward, 2 Dod. Adm. R. 269, 270.

sumption of injury from its violation, the law measures that injury by the best standard at its command, and that is a pecuniary standard. But in doing this it must take into account many things which it is impossible to estimate in money, but which nevertheless, money must compensate; the chief of these, in many cases, being the personal affront and indignity which are given by the wrongful act. Even a showing that the party was benefited, rather than damnified, would be no defense, since no man is compellable to have benefits thrust upon him offensively, and in defiance of his right of independent action; and if he were, it might be a good defense to rioters who had tossed one in a blanket, that the exercise was beneficial, or who had thrown him into a river, that his voluntary ablutions were not so frequent as health demanded.

A further reason makes the award of damages a necessity to the preservation of rights in many cases, and that is, that immunity tempts to the repetition of the act, and the frequent repetition has a tendency to fix in the minds of the community an impression that it is rightful—an impression that the party doing it, by consent or in some other manner, has become entitled to do it—and the community at length act upon this idea, and when at last complaint is made of the wrong, the frequent repetition becomes a witness in favor of the wrong-doer, and those who are to try the right come prepossessed with the idea [*71] that there must be something unsound in the case of the man who is so tardy with his complaint. At length the law itself may raise a presumption of a right, so that if one, by obstructing the waters of a stream, floods his neighbor's land, and perseveres in the wrong for a series of years, he may at last have the protection of the law in doing so, if in the meantime he has not been disturbed. The wrong, by acquiescence and presumption, has then become a right, and to interfere with it will be a legal wrong. For this reason many wrongs damnify the owner, not only by the direct loss they inflict, but by their tendency to obscure and disturb the foundations of the right itself through their frequent repetition.⁶³

63—Where the water of a running stream is used without right, although no appreciable damage

But in a very large proportion of cases the wrong is only complete when damage is suffered; that is to say, the act done is not wrongful in itself, but only becomes so when an injurious

may be sustained in the particular instance by the wrongful act, yet, as the repetition of such an act might be made the foundation of claiming the right to do the act hereafter, a damage in law has already been sustained, in respect of which an action is maintainable." COLERIDGE, J., in *Rochdale Canal Co. v. King*, 14 Q. B. 134-5. See *Turner v. Sterling*, 2 Lev. 50; *S. C.* 2 Vent. 25; *Bower v. Hill*, 1 Bing. N. C. 549; *Mason v. Hill*, 3 B. & Ad. 304; *S. C.* 5 B. & Ad. 1; *Wood v. Waud*, 3 Exch. 748. This last was an action for fouling the water of a running stream, to the injury of the plaintiffs, proprietors below. The water was already so polluted by the acts of others, that the act of defendant caused no actual damage to the plaintiff, the water, notwithstanding what was done by them, being just as applicable to useful purposes as it was before. POLLOCK, C. B. "We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land in its natural state, as an incident to the right to the land on which the water-course flowed; and that right continues, except so far as by user or by grant to the neighbor it may have been derogated from boring land owners. This is a case, therefore, of an injury to a right. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging in-

to the stream the foul water from their works. If the * * other sources of pollution above the plaintiffs should be afterwards discontinued, the plaintiffs, who would otherwise have had in that case pure water, would be compelled to submit to this nuisance, which would then do a serious damage to them." In *Webb v. Portland Manf. Co.*, 3 Sum. 192, Mr. Justice STORY says: "From my earliest reading, I have considered it laid up among the very elements of the common law, that whenever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it, and if no other injury is entitled to a verdict for nominal damages. *A fortiori* this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed without any possible remedial redress. In my judgment the common law countenances no such inconsistency, not to call it by a stronger name. Actual perceptible damage is not indispensable as the foundation of

*consequence follows.⁶⁴ Thus, if one build a fire on his [*72] own grounds there is no wrong in the act, and in law no complaint can be made of it; but if the circumstances surrounding the act render it imprudent and dangerous to the rights of others, and at length it spreads to the premises of others, inflicting damage, this damage completes the injury. In all such cases, that which may cause damage, but as yet has not done so, being something that the party may rightfully do, it cannot be taken notice of as a thing amiss until the damage is suffered; and the case differs from an assault, which in itself is a thing amiss. So if one call another a rogue, this speaking is not in itself a legal wrong, the law not supposing such words to be injurious; but if the person concerning whom they were spoken can show that he lost his employment in consequence, he thereby connects the speaking with a damage, which constitutes it, in law, *a thing amiss, and the tort is then complete. So [*73] many things which are actionable as nuisances, only becomes so when actual damage can be traced to them.⁶⁵

an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him." See, also, p. 200; also *Blanchard v. Baker*, 8 Greenl. 253, 23 Am. Dec. 504; *Whittemore v. Cutter*, 1 Gall. 429, 483; *Johns v. Stevens*, 3 Vt. 308; *Ripka v. Sergeant*, 7 W. & S. 9, 42 Am. Dec. 214; *Gladfelter v. Walker*, 40 Md. 1; *Mellor v. Pilgrim*, 7 Ill. App. 306; *Merrill v. Dibble*, 12 Ill. App. 85; *Green v. Weaver*, 63 Ga. 302; *Freudensteine v. Heine*, 6 Mo. App. 287.

64—A peculiar case which may be said to illustrate this rule was that of *Occum Co. v. Sprague Manf. Co.*, 34 Conn. 529. The plaintiffs were a corporation. The defendants maintained a dam, which

was said to injure land above, and not owned by them. The plaintiffs bought this land and instituted a suit for flooding the same. It was alleged by the defense that the purchase was made solely for the purpose of bringing the suit, and that the land was not used or intended to be used by the plaintiffs for corporate purposes. If this were proved, the court held the action could not be sustained. "We are not aware of any principle of law that will allow corporations, chartered and organized for specific purposes, to purchase or lease property, having no connection with their legitimate business, for the sole purpose of commencing and prosecuting a suit and harassing another under the forms of law." *CARPENTER, J.*, p. 541-2.

65—See the instructive cases of *Radcliffe's Exrs v. Brooklyn*, 4 N.

Mental Anguish. In the class of actions wherein there must be a concurrence of both wrong and damage in order to constitute a cause of action, the question arises whether mental suffering alone is such damage as will satisfy the requirement. The question has been much discussed in suits against telegraph companies, for negligence in sending messages announcing the sickness, death or funeral of a near relative. The first of these cases was decided in Texas in 1881 in favor of the right of recovery.⁶⁶ Since then there have been numerous decisions on the question with much conflict of authority. The reasons in support of the action are thus stated in an early case. "A telegraph company is a quasi public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If, in matters of mere trade, it negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held that, as to matters of far greater interest to a person, it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for \$100, or even less, it is responsible for the damage. It is said, however, if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that his son is dead, and will be buried at a certain time, there is no responsibility save that which is nominal. Such a rule, at first blush, merits disapproval. It would sanction the company in wrong-doing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must

Y. 195, 53 Am. Dec. 357; and *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, as to the cases in which that which is not unlawful in itself may become actionable. One who does not own the fee of a street upon which his land abuts is not wronged by the laying of a railroad track in the street until the use of the street becomes a nuisance to him. The damage establishes the wrong. *Grand Rapids, etc., R. R. Co. v. Heisel*, 38 Mich. 62.
66—So *Relle v. Telegraph Co.*, 55 Tex. 308.

be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damage, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so it may be said of any case when mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation. If an injury to the feelings be an element of actual damage in slander, libel and breach of promise cases, it seems to us it should equally be so considered in cases of this character.'⁶⁷ A recovery in such cases is now sustained by the courts of Iowa,⁶⁸ Kentucky,⁶⁹ North Carolina,⁷⁰ Tennessee⁷¹ and Texas.⁷² In Alabama it is held that damages for mental anguish may be recovered, in such cases, if the action is *ex constructu* but not if it is *ex delicto*.⁷³ The reverse is held in Iowa.⁷⁴

67—Chapman *v.* Western Union Tel. Co., 90 Ky. 265, 13 S. W. Rep. 880.

68—Mentzer *v.* Western Union Tel. Co., 93 Ia. 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72.

69—Chapman *v.* Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880; Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366; Western Union Tel. Co. *v.* Fisher, 107 Ky. 513, 54 S. W. 830; Western Union Tel. Co. *v.* Steenberger, 107 Ky. 469, 54 S. W. 829.

70—Young *v.* Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669; Thompson *v.* Western Union Tel. Co., 107 N. C. 449, 12 S. E. 427; Sherill *v.* Western Union Tel. Co., 116 N. C. 655; 21 S. E. 429; Cashion *v.* Western Union Tel. Co., 123 N. C. 267, 31 S. E. 493; Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938.

71—Wadsworth *v.* Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574; Newport News, etc., R. Co. *v.* Griffin, 92 Tenn. 692, 22 S. W. 737.

72—Loper *v.* Western Union Tel. Co., 70 Tex. 689, 8 S. W. 600; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598; Western Union Tel. Co. *v.* Moore, 76 Tex. 66, 12 S. W. 949; Gulf, etc., Tel. Co. *v.* Richardson, 79 Tex. 649, 15 S. W. 689; Potts *v.* Western Union Tel. Co., 82 Tex. 545, 18 S. W. 604.

73—Blount *v.* Western Union Tel. Co., 126 Ala. 105, 27 So. 779; Western Union Tel. Co. *v.* Krichbaum, 132 Ala. 535, 31 So. 607; Western Union Tel. Co. *v.* Blocker, 138 Ala. 484, 35 So. 463; Western Union Tel. Co. *v.* Waters, 139 Ala. 652, 36 So. 773.

74—Mentzer *v.* Western Union Tel. Co., 93 Ia. 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72.

The decided weight of authority is against the right to recover against telegraph companies, for negligence in sending messages, when the only damage is mental anguish.⁷⁵ The supreme court of Indiana supports its conclusion with the following reasons: "In determining the limits within which mental anguish was cognizable in the courts, the common law permitted that state of mind to be considered as an element in admeasuring damages in but two classes of cases, broadly speaking. In one, the negligent act was the proximate cause of a physical hurt; and the mental anguish, for which compensation was allowed was the proximate result of the physical hurt, not of the negligent act. For the agonies of mind the plaintiff suffered while the train bore down upon him with his foot caught in the frog, not one cent; but damages were allowable only for the mental anguish resulting from the fact that he must go through life a cripple. The using of cases of this sort in support of the 'mental anguish'

75—*Pray v. Western Union Tel. Co.*, 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463; *Russell v. Western Union Tel. Co.*, 3 Dak. 315, 19 N. W. 408; *International O. Tel. Co. v. Saunders*, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810; *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901; *Giddens v. Western Union Tel. Co.*, 111 Ga. 824, 35 S. E. 638; *Western Union Tel. Co. v. Hatton*, 71 Ill. App. 63; *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; overruling *Reese v. Western Union Tel. Co.*, 123 Ind. 294; *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406; *West v. Telegraph Co.*, 39 Kan. 93, 17 Pac. 807; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 9 So. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 38 Am. St. Rep. 575, 20 L. R. A. 172; *Burnett v.*

Western Union Tel. Co., 39 Mo. App. 599; *Newman v. Western Union Tel. Co.* 54 Mo. App. 434; *Morton v. Western Union Tel. Co.*, 53 Ohio St. 431, 41 N. E. 689, 53 Am. St. Rep. 648, 32 L. R. A. 735; *Butner v. Western Union Tel. Co.*, 2 Okl. 234, 37 Pac. 1087; *Lewis v. Western Union Tel. Co.*, 57 S. C. 325, 35 S. E. 556; *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026; *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17; *Chase v. Western Union Tel. Co.*, 44 Fed. 554, 10 L. R. A. 464; *Crawson v. Western Union Tel. Co.*, 54 Fed. 634; *Kester v. Western Union Tel. Co.*, 55 Fed. 603; *Western Union Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; *Gahan v. Western Union Tel. Co.*, 59 Fed. 433; *Stansell v. Western Union Tel. Co.*, 107 Fed. 668.

doctrine is not an extension of the application of the rules of the common law to new conditions, but is a distortion of the rules themselves, resulting from the failure to distinguish between the mental anguish that is attributable directly to the negligent act and the mental anguish that is the direct result of the physical hurt produced by the negligent act. In the other class of cases, of which malicious prosecution, seduction, libel, are illustrative, the wrongful act was affirmative, was one of commission, not merely of omission, was the product of intent or malice, express or implied; the wrongful act was the proximate cause of a legal hurt (a hurt that the law recognized) for which damages were recoverable, irrespective of mental anguish; and the damages allowable for mental anguish were not merely compensation for the mental condition produced by the legal hurt but were also punishment for the legal wrong. This class of cases is further removed from the 'mental anguish' doctrine than the first. Not only is there the distinction that exists between the first class of cases and the 'mental anguish' doctrine, namely, that in the one the mental anguish hangs upon the hurt produced by the negligent act, while in the other the mental anguish hangs directly upon the negligent act; but there is also the distinction that wilfulness or malice is found in the second class of cases, while the 'mental anguish' doctrine is based on pure negligence. One who unintentionally fails to perform a duty should pay compensatory damages only. One who maliciously infringes another's legal rights should pay both compensatory and punitive damages. To apply the rules relating to punitive damages for wilful wrongs to a case of unintentional default, is certainly not a mere extension of the application of the rules of the common law to new conditions. These classes of cases in which mental anguish is cognizable as an incident to causes of action complete without it, at least negatively indicate the common law rule that mental anguish as the proximate and sole result of a negligent act does not constitute a cause of action. And the rule follows affirmatively from the principle that damages may not be remote, nor conjectural, nor speculative.'⁷⁶

76—*Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 65, 66, 60

These decisions rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation.⁷⁷ Outside of the telegraph cases the authorities are almost unanimous in support of this principle⁷⁸ and there seems to be no

N. E. 674, 1080, 54 L. R. A. 846. The court further says, in the same opinion: "An extended examination of the authorities upholding the 'mental anguish' rule has disclosed but two claims that the doctrine has any root in the common law. One is, that for every wrong there should be a remedy. But, of an antiquity probably as great, at least extending back to the law-latin days are the phrases '*injuria sine damno*' and '*damnum absque injuria*.' The fathers of the common law declared that there were infractions of legal rights that produced no loss or injury the courts could deal with, and also that there were losses or injuries that the courts would recognize except for the fact that no legal right had been infringed. In saying that for every wrong there should be a remedy, by 'wrong' they meant a violation of the municipal law, the law of civil conduct, not a transgressor of the divine law as such, nor a breach of etiquette; and by 'remedy' (limiting it in this case to a remedy by way of damages) they intended damages that courts, dealing practically with the practical affairs of life, can find to be certain and measurable from evidence the source of which is open to both parties and the nature not transcendental. The common law, so far from furnishing the formula for trans-

muting a psychical condition into gold, classes the mental act that causes only mental anguish as an instance of '*injuria sine damno*.' The other claim that the 'mental anguish' doctrine is an outgrowth of the common law is, the relation of telegraph companies to the public. True, that relation requires telegraph companies to serve all the public impartially, and authorizes the public to control to a degree the terms of the contract for the transmission of messages. But the same relation exists between the public and railroad companies, public water or gas companies, and the like; and when the 'mental anguish' authorities join all others in the realms of English jurisprudence in declaring that merely negligent acts by these latter companies producing mental anguish alone are not actionable at common law, they plainly prove that the 'mental anguish' doctrine is not a native sprout, but a foreign graft." Pp. 69-70. This case overrules the prior case of *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163.

77—*Morton v. Western Union Tel. Co.*, 53 Ohio St. 431, 41 N. E. 689, 53 Am. St. Rep. 648, 32 L. R. A. 735.

78—*Gaskins v. Runkle*, 25 Ind. App. 584, 58 N. E. 740; *Cleveland, etc. R. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Spade v.*

good reason why the negligence of telegraph companies in transmitting messages should form an exception to the general rule.⁷⁹ The result of the authorities therefore is that mental anguish alone is not such damage as, in conjunction with negligence, will support an action.

Fright or mental anguish producing sickness or other physical effects. It is manifest that this is a very different case from the one last considered. There recovery was sought for a mental condition, the existence of which it is impossible to verify or combat. But sickness, miscarriage, St. Vitus dance, nervous prostration, and the like, any of which may be produced by fright or shock, are physical effects which may be observed and traced. When wrongful negligence towards the plaintiff produces fright and the fright causes disease or miscarriage, the physical effect so produced would seem to be the direct and proximate result of the negligence, within the meaning of the rule as to proximate cause, which is discussed in the following pages. Where a passenger in a street car was put in imminent peril of a collision by the company's negligence and was overcome by fright, went into convulsions and suffered a miscarriage, the miscarriage was held to be the proximate result of the negligence and the company was held liable. In giving its opinion the court says: "Now, if the fright was the natural consequence of—was brought about, caused by, the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of these injuries. That a mental condition or operation on the part

Lynn & B. R. R. Co., 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512; Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335; Spohn v. Missouri Pac. R. R. Co., 116 Mo. 617, 22 S. W. 690; Ewing v. Pittsburgh, etc. Ry. Co., 147 Pa. St. 40, 23 Atl. 340, 30 Am. St. Rep. 709; Linn v. Duquesne, 204 Pa. St. 551, 54 Atl. 341, 93 Am. St. Rep. 800; Huston v. Freemansburg, 212 Pa. St. 548; Gulf, etc. Ry. Co. v. Trott, 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 866. And see the numerous cases cited in the opinion of the court in Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846.
79—See case last cited.

of the one injured comes between the negligence and injury does not necessarily break the required sequence of intermediate causes.⁷⁸⁰

The right of recovery for such injuries is supported by a number of well considered cases both here and in England.⁸¹ On the other hand, perhaps an equal number of cases deny the right of recovery for such damages.⁸² The latter decisions are based

80—*Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

81—*Watson v. Dilts*, 116 Ia. 249, 89 N. W. 1068, 92 Am. St. Rep. 239; *Brownback v. Frailey*, 78 Ill. App. 262; *Plouty v. Murphy*, 82 Minn. 268, 84 N. W. 1005; *Hickey v. Welch*, 91 Mo. App. 4; *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 42 S. E. 983; *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; *Wilkinson v. Downton* (1897), 2 Q. B. 57; *Dulieu v. White & Sons* (1901), 2 K. B. 669. In the case first cited the court says: "It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently one who causes a diseased condition of the latter must anticipate the consequences which follow it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright." P. 252.

In *Wilkinson v. Downton*

(1897), 2 Q. B. 57, the defendant, for a practical joke, falsely told the plaintiff that her husband had met with a serious accident whereby both his legs were broken. This caused nervous shock, vomiting, etc., and was followed by serious consequences, though before that time the plaintiff had been a well woman. The defendant was held liable. So where a blast was set off by the defendant near the plaintiff's house without warning and she was either thrown from her chair or, rising involuntarily, stumbled or fell in a faint; and the shock and fall produced a miscarriage. *Cameron v. New England Tel. & Tel. Co.*, 182 Mass. 310, 65 N. E. 385.

82—*Braun v. Craven*, 175 Ill. 401, 51 N. E. 657; *Morse v. Chesapeake, etc. Ry. Co.*, 117 Ky. 11, 25 Ky. L. R. 1159, 77 S. W. 361; *Ward v. West Jersey, etc. R. R. Co.*, 65 N. J. L. 383, 47 Atl. 561; *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781; *Spade V. Lynn & B. R. R. Co.*, 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512; *White v. Sander*, 168 Mass. 296, 47 N. E. 90; *Lehman v. Brooklyn City R. R. Co.*, 47 Hun, 355; *Wulstein v. Mohlman*, 57 N. Y. Supr. 50, 5 N. Y. S. 569; *Huston v. Freemansburg*, 212 Pa. St. 548.

largely on grounds of public policy, founded on the difficulty in tracing the physical injuries complained of to the negligence of the defendant and in the opportunity afforded for speculative claims.⁸³ In one of the English cases cited, this position is answered by Kennedy, J., as follows: "I should be sorry to adopt a rule which would bar all such claims on the grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves a denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claims. My experience gives me no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright, than in weighing the like evidence as to the effects of nervous shock through a railway collision or carriage accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time."⁸⁴

It is held that there can be no recovery for fright which results in physical injuries, in the absence of any contemporaneous physical injury to the plaintiff "unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant."⁸⁵ Thus the supreme court of Minnesota holds that if

83—See especially *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657; *Spade v. Lynn & B. R. R. Co.*, 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512; *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781. In the last case the court says: "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation.

The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy." P. 110.

84—*Dulieu v. White & Sons* (1901), 2 K B. 669, 681.

85—*Sanderson v. Northern Pac. Ry. Co.*, 88 Minn. 162, 92 N. W. 542, 97 Am. St. Rep. 509, 60 L. R.

a passenger is put in peril of a collision by the negligence of the company and is thereby frightened and the fright produces a miscarriage, the company is liable for all the consequences,⁸⁶ while if the fright is caused by an assault made on the passenger's children or husband by the conductor, then there can be no recovery.⁸⁷ But if there may be a recovery for physical injuries resulting from fright wrongfully caused by the defendant, it would seem that an assault committed in the view of a woman whose presence is known, especially upon a member of her family, was an act of negligence towards the woman, a failure to exercise the due care towards her which the occasion and circumstances required, and was therefore a legal wrong against her which will support an action, if damage follows.⁸⁸

A. 403. To the same effect: *Buckman v. Great Northern Ry. Co.*, 76 Minn. 373, 79 N. W. 98; *Dulieu v. White & Sons* (1901), 2 K. B. 669. In the last case the plaintiff, a woman, was put in fear of bodily harm by the negligence of the defendant and the fright brought on a miscarriage. The right to recover was sustained but, in discussing the limitations upon the right to recover for injuries resulting from fright, Kennedy, J., says: "It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, when it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to one self. A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C., or towards the property of B. or C. * * * I should

not be prepared in the present case to hold that the plaintiff was entitled to maintain this action if the nervous shock was produced, not by the fear of bodily injury to herself, but by horror and vexation arising from the sight of injury being threatened or done either to some other person, or to her own or to her husband's property, by the intrusion of the defendant's van and horses. The cause of the nervous shock is one of the things which the jury will have to determine at the trial."

86—*Purcell v. St. Paul City Ry. Co.* 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

87—*Sanderson v. Northern Pac. Ry. Co.*, 88 Minn. 162, 92 N. W. 542, 97 Am. St. Rep. 509, 60 L. R. A. 403; *Buckman v. Great Northern Ry. Co.*, 76 Minn. 373, 79 N. W. 98.

88—*Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618. In this case the defendant, knowing that the plaintiff was pregnant and that excitement might pro-

Proximate and Remote Cause. It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is, that in law the immediate and not the remote cause of any event is regarded;⁸⁹ and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote cause. The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. A writer on this subject has stated the rule in the following language: If the *wrong and the [*74] resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.⁹⁰

duct serious injury, went into her yard and assaulted two negroes in her presence, causing fright and a miscarriage. He was held liable. And see to the same effect, *Watson v. Dilts*, 116 Ia. 249, 89 N. W. 1068, 92 Am. St. Rep. 239, where an assault was made upon

the plaintiff's husband by the defendant. But see *Gaskins v. Runkle*, 25 Ind. App. 584, 58 N. E. 740.

89—Bac. Max., reg. 1; *Broom Max.* 165.

90—Addison on Torts, p. 6. See *Marble v. Worcester*, 4 Gray, 395,

As this principle is of the highest importance in the law of torts, and the right of action in many cases, and the extent of recovery in others depend upon it, it may be well to consider it a little further. In doing this we lay down the following propositions:

per SHAW, Ch. J.; *Anthony v. Slaid*, 11 Met. 290; *Silver v. Frazier*, 3 Allen, 382, 81 Am. Dec. 662; *Crain v. Petrie*, 6 Hill, 522, 41 Am. Dec. 765; *Dale v. Grant*, 34 N. J. 142; *Haley v. Chicago, etc., R. R. Co.*, 21 Iowa, 15. The result must be the natural and probable consequence of the act, one which could have been foreseen in the light of the attending circumstances if the act does not amount to wanton wrong. *Railway Co. v. Kellogg*, 94 U. S. 469; *Scheffer v. Railroad Co.*, 105 U. S. 249; *Binford v. Johnston*, 82 Ind. 426; *Schmidt v. Mitchell*, 84 Ill. 195; *Eames v. Texas, etc., R. R. Co.*, 63 Tex. 660; *Campbell v. Stillwater*, 32 Minn. 308; *Decatur Car Wheel & Mfg. Co. v. Mehaffey*, 128 Ala. 242, 29 So. 646; *Johnsen v. Oakland, etc., Ry. Co.*, 127 Cal. 608, 60 Pac. 170; *Louisville, etc., Ferry Co. v. Nolan*, 135 Ind. 60, 34 N. E. 710; *Hurley v. Packard*, 182 Mass. 216, 65 N. E. 64; *South Side Pass. Ry. Co. v. Trich*, 117 Pa. St. 390; 11 Atl. 627, 2 Am. St. Rep. 672; *Behling v. S. W. Penn. Pipe Lines*, 160 Pa. St. 359, 28 Atl. 777, 40 Am. St. Rep. 724; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365; *Diesenrieter v. Malting Co.*, 97 Wis. 279, 72 N. W. 735; *Meyer v. Milwaukee, etc., Co.*, 116 Wis. 336, 93 N. W. 6; *Texas, etc., Ry. Co. v. Carlin*, 111 Fed. 777, 49 C. C. A. 605. The question is, is the damage the natural and reasonable result of the

act? The rule is the same in contract or in tort. *The Notting Hill*, L. R. 9 P. D. 105. The damage must be the natural and proximate result. *Ehrgott v. Mayor, etc.*, 96 N. Y. 264, 48 Am. Rep. 622; *Wiley v. West Jersey R. R. Co.*, 44 N. J. L. 247. It is enough that the damage is the natural, though not the necessary, result. *Miller v. St. Louis, etc., Ry. Co.*, 90 Mo. 389; *Balt., etc., Ry. Co. v. Kemp*, 61 Md. 74. In Wisconsin it has been held that it was unimportant that the injury could not have been contemplated as a probable result. *Brown v. Chicago, etc., Ry. Co.*, 54 Wis. 342, 41 Am. Rep. 41. But in a later case it is said that one is not liable if the jury find that the result was not under the circumstances to have been reasonably expected by an ordinarily prudent man. *Atkinson v. Goodrich Tr. Co.*, 60 Wis. 141, 50 Am. Rep. 352. When by mistake empty turpentine casks instead of ketchup casks were delivered by a carrier and by the consignee were filled with ketchup, which was spoiled by the turpentine, and the carrier knew the use made of casks so delivered by it, the English Court of Appeal held on demurrer that the carrier was not liable. *Cunningham v. Grt. North. Ry. Co.*, 16 A. & E. R. R. Cas. 254. Defendant used a common article for dyeing its cloths not known at the time to be injurious. A purchaser of

1. The one already more than once mentioned, that in the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result. *Here the wrong itself fixes the right of action; [*75] we need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence.

2. When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause.⁹¹

*3. If the original act was wrongful, and would naturally, according to the ordinary course of events, prove ,

the cloth injured by handling it cannot recover, as defendant was not bound to foresee such a result. *Gould v. Slater Woolen Co.*, 147 Mass. 315, 17 N. E. Rep. 531.

91—*Vicars v. Wilcocks*, 8 East, 1; *Railroad Co. v. Reeves*, 10 Wall. 176; *Cuff v. Newark, etc., R. R. Co.*, 35 N. J. 17, 10 Am. Rep. 205. A party who by contract is entitled to all the articles to be manufactured by a certain company, he furnishing the raw materials, cannot maintain an action against a wrong doer who by trespass stops the machinery of the company and obstructs its operations in performing the contract. *Dale v. Grant*, 34 N. J. 142, citing *Connecticut Ins. Co. v. New York, etc., R. R. Co.*, 25 Conn. 265; *Rockingham Ins. Co. v. Boscher*, 39 Me. 253; *Anthony v. Slaid*, 11 Met. 290. See also the valuable case of *Kahl v. Love*, 37 N. J. 5.

Reference to a few other cases on this subject may be desirable. A bridge having become impassable, one who desired to carry wood across piled it on the levee to await opportunity. A flood carried it off. Suit was brought for the loss, as being occasioned by the non-repair of the bridge. *Held*, too remote. *Dubuque Wood, etc., Association v. Dubuque*, 30 Iowa, 176. Only the party taking directly under a conveyance, and not a remote purchaser, can maintain an action against the officer who falsely certified the acknowledgment thereof. *Ware v. Brown*, 2 Bond, 267. For a like principle, see *Kahl v. Love*, 37 N. J. 5. If one sells a defective engine, which explodes, only the purchaser from him can maintain an action for negligence in construction. A third person injured by the explosion has no such remedy. *Losee v.*

injurious to some other person or persons, and does actually result in injury through the intervention of other causes which

Clute, 51 N. Y. 494, 10 Am. Rep. 638. One who is supporting a pauper for hire can maintain no action against a third person for assaulting and beating the pauper, thereby increasing the expense. *Anthony v. Slaid*, 11 Met. 290. One who has directed his agent to erect a house for him at a certain spot, can have no remedy against one who, by false representations regarding the boundary line, induces the agent in the owner's absence to begin the erection elsewhere. *Silver v. Frazier*, 3 Allen, 382, 81 Am. Dec. 662. If there is a defect in a hitching post, and the horse hitched to it is frightened by the running away of another horse, and breaks the post and runs over a person in the street, the latter cannot maintain a suit for the defect in the post as the cause of his injury. *Rockford v. Tripp*, 83 Ill. 247. Plaintiff, who was in bed in her house, was so frightened by a quarrel between her husband and defendant out of doors, the noise of which she heard, as to give premature birth to a child. Defendant did not know of her being in the house nor of her physical condition. He had no reason to suppose this injury would follow his acts. Held not liable. *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607. The shooting of a dog is not the proximate cause of a woman's illness resulting from fright thereat. *Renner v. Canfield*, 36 Minn. 90. A wire fence between defendants and plaintiff's land rusted and decayed through

the former's negligence. The latter's cattle were killed by eating pieces of wire which fell on plaintiff's land. Held, that the death was the natural result of defendant's negligence. *Firth v. Bowling Iron Co.*, L. R. 3 C. P. D. 254. A drunken passenger was lawfully removed from a train and placed away from the track a short distance. He lay down on the track and was run over by another train. Held, that his getting on the track was not the natural, necessary or usual result of having been left near the track. *McClelland v. Louisville, etc., Ry. Co.*, 94 Ind. 276. A liquor dealer put a man who had drunk to intoxication in a sleigh and started the horses homeward. Owing to the driver's condition an accident happened and a horse was killed. The liquor seller was held liable for the death. *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42, distinguishing earlier cases. The sudden starting of a train without signals made a laborer step aside into the edge of a sand pit. Some sand shortly after fell and pushed him against the cars. The starting of the train was not the proximate cause. *Handelun v. Burlington, etc., R. Co.*, 72 Ia. 709, 32 N. W. 4. A city is not liable for the injury resulting to a person from the breaking in a violent wind of a sound and properly secured liberty pole. *Allegheny v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649. The burning of cotton in a high wind by sparks from a burning building is not the proximate

are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent.⁹² But if the origi-

mate result of failing to forward it promptly from a cotton yard, where it was exposed to fire from locomotives and men smoking. *Wharfboat Ass. v. Wood*, 64 Miss. 661. See, further, *Sharp v. Powell*, L. R. 7 C. P. 253; *Hullinger v. Worrell*, 83 Ill. 220; *Haley v. Chicago, etc., R. R. Co.*, 21 Iowa, 15; *Sledge v. Reid*, 73 N. C. 410; *Bank of Commerce v. Ginocchio*, 27 Mo. App. 661. In this last case loss arose from sending a draft in a letter without a street address, which reached another man of the name of the payee who sold it to plaintiff.

92—*American Express Co. v. Risley*, 179 Ill. 295, 53 N. E. 558; *Cleveland, etc., Ry. Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569; *Brash v. St. Louis*, 161 Mo. 433, 61 S. W. 808; *Phillips v. New York Central, etc., R. R. Co.*, 127 N. Y. 657, 27 N. E. 978; *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. 932; *Rosenbaum v. Shoffner*, 98 Tenn. 624, 40 S. W. 1086; *Howe v. West Seattle L. & I. Co.*, 21 Wash. 594, 59 Pac. 495; *Goe v. Northern Pac. Ry. Co.*, 30 Wash. 654, 71 Pac. 182.

That innocent causes intervene makes no difference. *Rich v. New York, etc., R. R. Co.*, 87 N. Y. 382. Defendant without authority placed a barrier set with spikes across a private road. Some unknown person removed part of it without authority of defendant and set it up across the foot path. Plaintiff on a dark night was walking along the road. After passing the barrier he turned upon the foot path and walked against

the part of the barrier which had been placed there. *Held*, he could recover for injury thereby suffered. After stating the doctrine of *Sharp v. Powell*, that to cause a liability the injury must be a probable result of the act of the person charged and agreeing to it as applied to the facts in that case and doubting its applicability to these facts, the court says:

"At the same time it appears to us that the case before us will stand the test thus said to be the true one, for a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the way, as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near. * * * If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which should injury to an innocent party occur the original author of the mischief should be held responsible." *COCKBURN, C. J. Clark v. Chambers*, L. R. 3 Q. B. D. 327.

A man left fish brine, poisonous to cattle, in barrels in the street. Another seeing cattle trying to drink it, spilled it in the street. Cattle licked it up and died. The leaving it in barrels in the street held the proximate cause. *Henry v. Dennis*, 93 Ind. 452. A workman fell from a ladder which

nal wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by [*77] another, *the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote.⁹³

We may pause here to give some illustrations of this proposition, beginning with the leading case of *Scott v. Shepherd*, where the facts were that the defendant threw a lighted squib into a crowd of people, one after another of whom in self protection threw it from him until it exploded near the plaintiff's eye, and blinded him. Here was but a single wrong; the origi- [*78] *nal act of throwing the dangerous missile; and though the plaintiff would not have been harmed by it but for the subsequent acts of others throwing it in his direction, yet as these were instinctive and innocent, "it is the same as if a

broke from a defect and knocked a man below him off a platform. The defect was the proximate cause of the latter's injury. *Ryan v. Miller*, 12 Daly, 77. A horse took fright from the carriage striking an obstruction in the way, and became unmanageable, and ran away, injuring the driver. *Held*, that the obstruction was the proximate cause of the injury. *Clark v. Lebanon*, 63 Me. 393, citing *Willey v. Belfast*, 61 Me. 569; *Marble v. Worcester*, 4 Gray, 395. On proximate cause where the injury is caused in part by fright of horse and in part by defective condition of highway, see *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Wright v. Templeton*, 132 Mass. 49; *Spaulding v. Winslow*, 74 Me. 528; *Aldrich v. Gorham*, 77 Me. 287; *Perkins v. Fayette*, 68 Me. 152; *Crawfordsville v. Smith*, 79 Ind. 308, 61 Am. Rep. 612. If a wagon is overturned by an obstruction in a road, and after such

an overturn the horse runs upon a railroad track and after running four miles is killed by an engine, the obstruction in the road is not the proximate cause of the injury. *West Mahanoy v. Watson*, 116 Pa. St. 344, 9 Atl. 430.

If parties loan money on forged certificates of stock in a corporation, and afterwards obtain on these new certificates from the corporation which prove worthless, the proximate cause of their loss is the forgery, unless they can show that they might have avoided the loss but for the negligence of the corporation when the new certificates were applied for. *Brown v. Howard Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90. See further, *McCafferty v. Railroad Co.*, 61 N. Y. 178.

93—Paragraph quoted and approved. *Currier v. McKee*, 99 Me. 364, 59 Atl. 442, and see *Meyer v. Butterbrodt*, 43 Ill. App. 312.

cracker had been flung, which had bounded and rebounded, again and again before it had struck out the plaintiff's eye,"⁹⁴ and the injury is *therefore a natural and proximate result of the original act. It is an injury that should have been foreseen by ordinary forecast; and the circumstances con

94—Scott v. Shepherd, 3 Wils. 403; S. C. 2 W. Bl. 892. And see Scott v. Hunter, 46 Pa. St. 192, 84 Am. Dec. 542. In Baltimore & Potomac R. R. Co. v. Reaney, 42 Md. 117, 136, ALVEY, J., says: "In the application of the maxim, *In jure non remota causa, sed proxima spectatur*, there is always more or less difficulty, and attempts are frequently made to introduce refinements that would not consist with principles of rational justice. The law is a practical science, and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause, in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned.

"It is certainly true that where two or more independent causes concur in producing an effect, and it cannot be determined which was the efficient and controlling cause, or whether, without the concurrence of both, the event would have happened at all, and a particular party is responsible for only the consequences of one of such causes, in such case a recovery cannot be had, because it cannot be judicially determined that the damage would have been

done without such concurrence. Marble v. Worcester, 4 Gray, 395. But it is equally true that no wrong doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put in operation by his own wrongful act. To entitle such party to exemption he must show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done. Davis v. Garrett, 6 Bing. 716."

So if one negligently frightens the horse of another, and the latter runs against and injures a second horse, the owner of the latter may have his action for the negligence. McDonald v. Snelling, 14 Allen, 290, 92 Am. Dec. 768. Forney v. Geldmacher, 75 Mo. 113, 42 Am. Rep. 388; Billman v. Ind. etc., Co., 76 Ind. 166, where it is said it is unnecessary that the precise injury should reasonably have been anticipated. One injured by another's horse running away from fright at overturning of vehicle caused by ice negligently left in the street by a third person may recover from the latter. Lee v. Union R. R. Co., 12 R. I. 383, 34 Am. Rep. 668.

joined with it to produce the injury being perfectly natural, these circumstances should have been anticipated.

The defendant's servant left his team of horses, which were high spirited and fractious, unhitched and uncared for in the street. The team ran away, hit a child and knocked her under the wheels of a loaded wagon, which ran over her and caused her death. The defendant's negligence, through his servant, was held to be the proximate cause of the death of the child.⁹⁵ So where a horse, negligently left unhitched in a city street, started off and, being frightened by persons trying to catch him, ran away and injured the plaintiff, the owner was held liable.⁹⁶ A railroad company recklessly ran down and killed a person on its track and the engine threw the body against the plaintiff, a section hand, causing personal injuries. The negligence of the company was held to be the proximate cause of the plaintiff's injuries.⁹⁷ So where a man was lawfully near the track of a railroad company and was hit by a cow negligently struck by an engine and thrown against him.⁹⁸ The same conclusion was reached where a man carrying a box of tools was negligently run down at a crossing and some of the tools were hurled against the plaintiff.⁹⁹ A fireman, believing himself in peril from ob-

95—*Pierce v. Conners*, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279.

96—*Phillips v. Dewald*, 79 Ga. 732, 7 S. E. 151, 11 Am. St. Rep. 458. A similar case: *Denver, etc., R. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. 261.

97—*Western, etc., R. R. Co. v. Bailey*, 105 Ga. 100, 31 S. E. 547. The court says: "The negligence of defendant put in motion the destructive agency, and the injury sustained by the plaintiff was directly attributable thereto, and there was no intervention of a new force or power of itself sufficient to stand as the cause of the mischief; there was no new and in-

dependent force acting in and of itself causing the injury, and superseding the original wrong so as to make it remote in the chain of causation, there was no interposition of a separate independent agency over which the defendant neither had nor exercised control." P. 102.

98—*Alabama, etc., R. R. Co. v. Chapman*, 80 Ala. 615; *Marchand v. Gulf, etc., Ry. Co.*, 20 Tex. Civ. App. 1, 48 S. W. 779.

99—*Hammill v. Pa. R. R. Co.*, 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531. But where the plaintiff was standing on the platform near a crossing, waiting for a train, and an express struck a woman

structions ahead, jumped from the train and hit a section hand beside the track. The company was held liable, the fireman being regarded as an inanimate object set in motion by the defendant's negligence.¹ Where a boy, carelessly or inadvertently pushed a second boy against a third boy and caused the latter to fall down an unguarded embankment, the want of a railing was held to be the proximate cause of the accident.²

An illustration of a different sort is afforded by the case of *Morrison v. Davis*.³ In that case common carriers undertook to transport goods from Philadelphia to Pittsburgh by canal. While on their way the goods were destroyed by an extraordinary flood. There was evidence that the goods would not have been at the place of injury but for their having been delayed by the lameness of a horse attached to the boat; and the argument made on behalf of the plaintiff was, that the culpability of the defendants in allowing the boat to be delayed by the lameness of the horse, having exposed the boat to the flood, was the proximate cause of the loss. Now, if human foresight could foresee the exact time when such a flood might be anticipated, the argument would be unanswerable; but as this is impossible, and an accident of the sort is as likely to overwhelm a boat that has been moved with due diligence as one that has been unreasonably delayed, it is obvious that the antecedent probabilities are equal, that the delay will save the boat instead of exposing it to destruction.⁴ As is said by

on the crossing and threw her against the plaintiff, the company was held not liable. There was evidence that the woman was negligent; also that there was a failure to give the statutory warnings. The accident to the plaintiff was held not to be the natural and probable consequence of the negligence in not giving the warnings. *Wood v. Pa. R. R. Co.*, 177 Pa. St. 306, 35 Atl. 699, 55 Am. St. Rep. 728, 35 L. R. A. 199.

1—*Jackson v. Galveston, etc., R. R. Co.*, 90 Tex. 372, 38 S. W. 745. "The law presumes that an act or

omission done or neglected under the influence of pressing danger, was done or neglected involuntarily." *Laidlow v. Sage*, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216.

2—*Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 16 Am. St. Rep. 148, 4 L. R. A. 721.

3—20 Pa. St. 171, 57 Am. Dec. 695.

4—To the same effect: See *Academy of Music v. Hackett*, 2 Hilt. 217; *Ashley v. Harrison*, 1 Esp. 48; *Butler v. Kent*, 19 Johns. 223, 10 Am. Dec. 219; *Davis v. Central Vt. R. R. Co.*, 66 Vt. 290, 29 Atl.

the Court in the case referred to: "A blacksmith pricks a horse by careless shoeing. Ordinary foresight might anticipate lameness, and some days or weeks of unfitness for use; but it could not anticipate that by reason of the lameness the horse would be delayed in passing through a forest until a tree fell and killed him or injured his rider; and such injury would be no proper measure of the blacksmith's liability."⁵ So the negligent delay

313, 44 Am. St. Rep. 852; *Herring v. Chesapeake, etc., R. R. Co.*, 101 Va. 778, 45 S. E. 322; *Thomas v. Lancaster Mills*, 71 Fed. 481, 19 C. C. A. 88.

5—LOWRIE, J., in *Morrison v. Davis*, 20 Pa. St. 171, 175, 57 Am. Dec. 695. See *Hoadley v. Nor. Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106. But had the property been exposed to the flood by a wrongful act concurrent in point of time, the party would have been responsible. *Scott v. Hunter*, 46 Pa. St. 192, 84 Am. Dec. 542. Or if the flood had occurred in consequence of a wrongful act. *Dickinson v. Boyle*, 17 Pick. 78, 28 Am. Dec. 281. See, further, *Railroad Co. v. Reeves*, 10 Wall. 176; *McGrew v. Stone*, 53 Penn. St. 436; *Denny v. N. Y. Cent. R. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645; *George v. Fisk*, 32 N. H. 32; *Alston v. Herring*, 11 Exch. 822. A railroad train running behind time was upset by a gale of wind, and the plaintiff was injured. Had the train been on time the gust would not have reached it. *Held*, that the injury could not be attributed to the delay as the proximate cause, and the railroad company was not liable. *McClary v. Sioux, etc., R. R. Co.*, 3 Neb. 44, 19 Am. Rep. 631. See *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264. Compare

Read v. Spalding, 5 Bosw. 395. In New York the doctrine of the cases above cited is rejected. See *Condict v. Grand Trunk R. R. Co.*, 54 N. Y. 500. In that case a common carrier was chargeable with delay in the transportation of goods, and they were burned in its warehouse. *Earl, Com.* "The question to be considered is whether the loss by fire was in such a sense a consequence of the delay as to impose any liability upon the defendant. There was a clause in the conditions annexed to the contract, that the defendant should not be responsible for damage occasioned by fire. There was a similar clause in the contract in the case of *Lamb v. Camden & Amboy R. R. & T. Co.*, 46 N. Y. 271, 7 Am. Rep. 327, and it was held that such clause did not exonerate the carrier from a loss occasioned by fire, in case the fire resulted from its own negligence. So in this case, if the loss can be attributed to the fault or negligence of the defendant, it must be held liable. But it is claimed that the delay on the part of the defendant in the transportation of the goods, which exposed them to fire, was the remote and not the proximate cause of the loss, and hence that the defendant cannot be held liable for the loss without violating the maxim, *causa pro-*

of a train is not the proximate cause of an injury to a passenger by the accidental discharge of a gun in the hands of a bystander.⁶

*In further illustration of this subject, two other cases [*80] may be compared; in the first of which a man who had been up in a balloon landed upon private grounds, attracting *upon them a considerable number of people, by [*81] whom the premises and crops were considerably damaged. For this he was held responsible as for a result he should have foreseen and avoided.⁷ In the other, a preacher attracted a crowd

ima non remota spectatur. But the law is otherwise settled in this State. In *Michaels v. New York Central Railroad company*, 30 N. Y. 564, 86 Am. Dec. 415, the defendant received at Albany, from the Hudson River Railroad Company, a box of goods to be transported to Rochester and delivered to the owners. Instead of forwarding the box immediately, it detained the same in its freight-house at Albany, to await the rendering of a bill for back charges by the Hudson River Railroad Company. While so detained, the goods were injured by being wet by an unusual and extraordinary rise in the water of the Hudson River; and it was held that the detention of the goods was negligence on the part of the defendant, and that such negligence having concurred in and contributed to the injury to the goods, the defendant was precluded from claiming the exemption from liability which the law would otherwise extend to it. The same rule was held in *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426, and reiterated by RAPALLO, J., in *Bostwick v. Baltimore & Ohio Railroad Co.*, 45 N. Y. 712. A different

rule was applied in *Morrison v. Davis*, 20 Pa. 171, and in *Denny v. New York Central Railroad Co.*, 13 Gray, 481, 74 Am. Dec. 645. But those cases were cited in the argument of the cases above referred to in the Court of Appeals, and were not followed. The rule adopted in Massachusetts and Pennsylvania was also applied in *Railroad Company v. Reeves*, 10 Wallace, 176. Those decisions are in direct conflict with the law as settled in this State, and cannot control the decision of this case. The defendant's delay was unreasonable. It was attributable to defendant's fault, and it exposed the goods to the fire by which they were consumed. Hence, its fault contributed to the loss, and it thus became liable."

6—*Reid v. Evansville, etc., R. R. Co.*, 10 Ind. App. 385, 35 N. E. 703. The delay in delivering a message warning a man that he is being pursued by armed men is not the proximate cause of his death at the hands of such pursuers. *Ross v. Western Union Tel. Co.*, 81 Fed. 676, 26 C. C. A. 564.

7—*Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234. The case of *Toms v. Whatby*, 35 U. C. Q. B.

about him in the public street, some of whom mounted a pile of stones which were private property, and by their weight broke them. Whether the speaker should have anticipated this result, it was said, was a question of fact for the jury. "It cannot be said with judicial certainty that when he stopped to make his speech in the street he must have foreseen, as the natural and probable consequence of his act, that the persons collecting together to listen to him would mount the pile of stones, and even if some of them would, that so many would as, by their connected weight, might break some of the stones. The lowermost stones in the pile were already trusted by the plaintiff with the weight of the uppermost. Height of pile, strength of grain, distance from the speaker, number of bystanders, and perhaps other circumstances, all would enter into the question of the probability of injury. The question was therefore one of fact for the jury, and not of law for the court."⁸

195, is a valuable case on the general subject of remoteness of injury from the cause. The facts were that the approach to a bridge was not protected by any railing or guard; that the plaintiff's wife was driving over the bridge, when the horse shied, and backed the carriage over the bank. *Held*, that the injury was to be attributed to the want of the railing as the proximate cause. See also *Wright v. Templeton*, 132 Mass. 49; *Burrell v. Uncapher*, 117 Pa. St. 353, 11 Atl. 619; *Spaulding v. Winslow*, 74 Me. 528. A railway track was laid in a street with no fence between it and the drive-way. A horse being driven on the street was frightened by a moving car and ran upon the track, throwing out and injuring the plaintiff. In an action against the city, held that moving of the car was not so far the proximate cause of the injury as to prevent a recovery.

"When several concurring acts or conditions of things,—one of them the wrongful act of defendant—produce the injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury. The injury is one which might reasonably be anticipated as a natural consequence of the act or omission." *Campbell v. Stillwater*, 32 Minn. 308. See *Maher v. Winona*, etc., R. R. Co., 31 Minn. 401. Compare *De Camp v. Sioux City*, 74 Ia. 392, 37 N. W. 971, where because of a defect in the street one could not turn out and avoid collision with a wagon recklessly driven, and the defect was held not the proximate cause of the injury.

8—*Fairbanks v. Alston*, 70 Pa. St. 86, 91, per AGNEW, J.; *Kerr v. Herring*, 11 Exch. 812.

The question of proximate cause is usually for the jury upon all the facts.^{8a} Proximate cause is said to be a mixed question of law and fact which must be submitted to the jury under proper instructions.^{8b} But where the facts are undisputed and the inferences to be drawn from them are plain and not open to doubt by reasonable men, it is the duty of the court to determine the question as a matter of law.^{8c}

*It may also be instructive to compare two others, in [*82] each of which successive events followed the original cause before the damage was suffered, but in the one the wrong of a

8a—*Eames v. Texas, etc., R. R. Co.*, 63 Tex. 660; *Hoag v. Lake Shore, etc., R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264, 48 Am. Rep. 622; *Atkinson v. Goodrich Tr. Co.*, 60 Wis. 141, 50 Am. Rep. 352; *East Tenn., etc., Co. v. Lockhart*, 79 Ala. 315; *Pullman, etc., Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601; *Drake v. Kiely*, 93 Pa. St. 492; *Crowley v. Cedar Rapids, etc., Co.*, 65 Ia. 658; *Savage v. Chicago, etc., Ry. Co.*, 31 Minn. 419; *Landgraff v. Kuh*, 188 Ill. 484, 59 N. E. 501; *True & True Co. v. Woda*, 201 Ill. 315, 66 N. E. 369; *Haverly v. State Line, etc., R. R. Co.*, 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848; *Bunting v. Hogsett*, 139 Pa. St. 363, 21 Atl. 31, 23 Am. St. Rep. 192, 12 L. R. A. 268; *Davis v. McKnight*, 146 Pa. St. 610, 23 Atl. 320; *Brashear v. Phila. Traction Co.*, 180 Pa. St. 392, 36 Atl. 914; *McCafferty v. Pa. R. R. Co.*, 193 Pa. St. 339, 44 Atl. 435, 74 Am. St. Rep. 690; *Gudfelder v. Pittsburg, etc., Ry. Co.*, 207 Pa. St. 629, 57 Atl. 70; *Hoehle v. Allegheny Heating Co.*, 5 Pa. Supr. Ct. 21; *Stecher v. People*, 217 Ill. 348, 75 N. E. 501; *Phillips v. Railroad Co.*, 138 N. C. 12.

8b—*Meyer v. Butterodt*, 146 Ill. 131, 34 N. E. 152.

8c—*Hoag v. Lake Shore, etc., Co.*, 85 Pa. St. 293, 37 Am. Rep. 653; *West Mahanoy v. Watson*, 116 Pa. St. 344, 9 Atl. 430; *Henry v. St. Louis, etc., Co.*, 76 Mo. 288, 43 Am. Rep. 762; *Lewis v. Flint, etc., Co.*, 54 Mich. 55, 52 Am. Rep. 790; *Gudfelder v. Pittsburg, etc., Ry. Co.*, 207 Pa. St. 629, 57 Atl. 70; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253. In *Harrison v. Buckley*, 1 Stub. 525, 529, it is said: "Such nearness in the order of events and closeness in the relation of cause and effect must subsist that the influence of the injurious act may predominate over that of other causes, and shall concur to produce the consequence, or may be traced to those causes. To a sound judgment must be left each particular case. The connection is usually enfeebled, and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequence than the first injurious act. It is therefore required

third party intervened, while in the other the subsequent acts were blameless. In *Vicars v. Wilcocks*⁹ the special damage from defamation for which a recovery was sought, was the discharge of the plaintiff from his employment before the time for which he had been engaged had expired. But this, as Lord ELLENBOROUGH showed, was "a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterward assembled and seized the plaintiff and thrown him into a horsepond by way of punishment for his transgression."¹⁰ In *Thomas v. Winchester*,¹¹ the defendant, who was a druggist, negligently sold a package of poison labelled as extract of dandelion, a harmless medicine, to another druggist, who re-sold it to a third, who sold it to the plaintiff, who was injured by making use of it, supposing it to be correctly labelled. The court distinguish the case from one in which two parties deal with each other under no obligations but such as their contract imposes, and charged with no duty to third persons, and hold that where one puts up drugs for a dealer, to be used not by him but by such person as may eventually purchase for use, he is charged with a duty towards every person who may become purchaser to

that the consequences to be answered for should be natural as well as proximate. By this I understand not that they should be such as, upon a calculation of chances, would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued, one from another, without the concurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from."

9—8 East. 1. Where a city neg-

ligently leaves a pit open in the street, it is not liable to one wilfully thrown into it by another. *Alexander v. Newcastle*, 115 Ind. 51, 17 N. E. 200. But otherwise if one is pushed in by the carelessness or inadvertence of another. *Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 16 Am. St. Rep. 148, 4 L. R. A. 721.

10—See, also, *Ward v. Weeks*, 7 Bing. 211; *Tutein v. Hurley*, 98 Mass. 211, 93 Am. Dec. 154.

11—6 N. Y. 397; S. C. Big. Lead. Cas. on Torts, 602. See, also, *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Wheeler v. Downer, etc.*, Co., 104 Mass. 64.

label them correctly, and the number of intermediate sales that, in the natural course of business, may take place is immaterial.¹² There is a maxim that “fraud is not purged [*84] by circuitry,” and this is true of any wrongful act. If its influence must naturally, and without the interposition of any extraordinary event, produce to some one an *injur- [*85] ous result, it is immaterial what shall be the circuit of events or the number of successive stages.

How far one may be chargeable with the spread of fire negli*gently started by himself, is one that has attracted [*86] no little attention in judicial circles, and led to some

12—*Lynch v. Nurdin*, 1 Q. B. 29, is relied upon, and *Illidge v. Goodwin*, 5 C. & P., 190 distinguished. And, see, *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Thompson v. Louisville, etc.*, R. R. Co., 91 Ala. 496, 8 So. 406, 11 L. R. A. 146; *Ronker v. St. John*, 21 Ohio C. C. 39. And compare *Carter v. Towne*, 103 Mass. 507. If one innocently repeated a slander, the slanderer may be held liable therefor. *Keenholts v. Becker*, 3 Denio, 346. Compare *Hastings v. Palmer*, 20 Wend. 225. As to the consequences that may reasonably be expected to follow a wrongful act, see *Greenland v. Chaplin*, 5 Exch. 243, 248; *Hoey v. Felton*, 11 C. B. (N. S.) 142; *Weatherford v. Fishback*, 4 Ill. 170; *Young v. Hall*, 4 Ga. 95; *Addington v. Allen*, 11 Wend. 375. In *Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268, a man who chased a boy with an axe into a store, was held liable for injury done by the boy in the store while endeavoring to escape. If, through one's negligence, his mill-dam gives way, and the force of the water carries away a dam below,

and the volume thus increased inflicts an injury upon a proprietor below, the damage is chargeable to the original negligence, and the party guilty of it may be held responsible. *Pollett v. Long*, 56 N. Y. 200. And, see, *Gilbertson v. Richardson*, 5 C. B. 502; *Powell v. Deveney*, 3 Cush. 300, 50 Am. Dec. 738. So when a dam causes sand coming down the stream to be deposited on the land above it. *Himes v. Jarrett*, 26 S. C. 480, 2 S. E. 393. If defendant loosens a shoe put on a horse by plaintiff, a smith, with intent to make him appear a poor workman and deprive him of the custom of the owner of the horse and damage results, he is liable. *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603. A fence about a field was burnt by fire from a locomotive. Cattle pastured near got in and damaged the crop. The railroad company was held liable. *Miller v. St. Louis, etc. Co.* 90 Mo. 389. A child by reason of a defective sidewalk fell into a ditch, in which was glass and was thereby cut. The city was held liable. *Galveston v. Posnain-sky*, 62 Tex. 118, 50 Am. Rep. 517.

difference of opinion. In New York it is held that while the culpable party would be liable to the owner of an adjoining house to which the fire had spread, he would not be liable to one to

Water from a railroad tank ran upon adjoining land in winter and froze. The company was held liable for the damage done by the freezing. *Chicago, etc. Ry. Co. v. Hoag*, 90 Ill. 339. A defective brake broke as a train was increasing speed with the result that a coupling gave way and the train parted. After a little the forward portion stopped and the two parts collided and the conductor was killed. *Held* that there was no intervening cause and that for the use of the defective brake the company was liable to his representative. *Ransier v. Minn. etc. Ry. Co.*, 32 Minn. 331. From the breaking down of his carriage due to a defect in the road, a man received a shock. In getting another carriage and driving home he was wet through in a rain and became ill. The jury finding that he acted with reasonable prudence and that his disease was due to the shock aggravated by the exposure, the city was held liable. *Ehrgott v. Mayor, etc.*, 96 N. Y. 264, 48 Am. Rep. 622. A locomotive engineer, perceiving that the track had spread, reversed his engine, and in handling the lever injured his arm. The spreading of the track was due to defendant's fault. *Held* that the jury were to decide whether that fault was the proximate cause of the injury. "Reversing the lever is one of the ordinary hazards of plaintiff's employment; yet, if the negligence of the defendant required such act to be done at that particular time and

the plaintiff * * acted prudently, with due regard for his own safety and the safety of others, then the defendant is liable." Following the *Squib* case. *Knapp v. Sioux City, etc. R. R. Co.* 65 Ia. 91, 54 Am. Rep. 1. *SEEVERS, J.* See also, *Drake v. Kiely*, 93 Pa. St. 492; *Crowley v. Cedar Rapids, etc. R. R. Co.*, 65 Ia. 658; *Savage v. Chicago, etc. Ry. Co.*, 31 Minn. 419. This question has frequently arisen where railway passengers have been put off cars at the wrong place and suffered from exposure. In one case a woman so put off, finding no means of conveyance, walked five miles and suffered in consequence, and the carrier was held liable. *Cincinnati, etc. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179. So where a man was made ill by an injury suffered by like negligence and caught a fever then prevalent of which he died. *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168. So where a pregnant woman was obliged to walk three miles and as a result miscarried, although the carrier did not know her condition. *Brown v. Chicago, etc., Ry. Co.*, 54 Wis. 342, 41 Am. Rep. 41. See *Louisville, etc., R. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186. An opposite conclusion is reached in Colorado where the injury came from the exposure of the woman in her peculiar condition. *Pullman, etc., Co. v. Barker*, 4 Col. 344, 34 Am. Rep. 89. See, in line with this case, *Francis v. St. Louis Tr. Co.*, 5 Mo. App. 7; and as to a man of

whose house the fire should spread from the burning of the first; the court apparently being more influenced in their decision

83, Louisville, etc., Co. *v.* Fleming, 14 Lea, 128; see also, Texas, etc., Ry. Co. *v.* Case, 66 Tex. 562. A lad negligently injured by blasting of rocks, after a partial paralysis lasting six months and while still unlikely to recover, contracted pneumonia and died. The attending physician was not prepared to state what caused the pneumonia. *Held* that the court could not charge that the injury was not the proximate cause of the disease, that it did not cause or largely contribute thereto. "It cannot be said that here was a second wrongful act, or a disease, wholly independent of the first wrong, which caused the death of the boy." *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163, 45 Am. Rep. 30. See Louisville, etc., R. R. Co. *v.* Jones, 83 Ala. 376, 3 So. 902. To same effect where a woman was thrown against a car railing and afterward cancer developed. *Balt. etc., Ry. Co. v. Kemp*, 61 Md. 74; and, see, *Owens v. Kansas City, etc., Co.*, 85 Mo. 169, 8 S. W. 350; *Contra*, *Jewell v. Railway Co.*, 55 N. H. 84. If an arm is broken by defendant's negligence, he may be liable if a false joint is formed when the patient is treated by surgeons of ordinary skill. *Pullman, etc., Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601. A steerage passenger was in a lower berth when the upper tier fell down through defendant's negligence. This so frightened plaintiff that she became partially paralyzed and had to be removed from her berth by others in order that the upper tier might be repaired. Being unable

to help herself after being placed on her feet, she was thrown against a door by the rolling of the vessel, was then picked up by the steward and put in a wet place till the berths were repaired. *Held* she could recover for the injuries suffered by her fall and wetting; that the jury could find her condition of mind to have been caused by the fall of the berths, and that when in that condition defendant did not take proper care of her. *Smith v. Brit., etc., Packet Co.*, 86 N. Y. 408.

On the other hand recent cases illustrate the doctrine that there is no liability if a distinct cause intervenes between the defendant's wrong and the damage. By the wrong of defendant, plaintiff in the night was carried past a station where he had a right to be left and beyond where he had a right, from the information given him by defendant's servants, to suppose he was when he left the car. Before he suffered any injury he discovered the mistake, and knowing the surroundings started back to reach the road he meant to take. He knew and sought to avoid a cattle guard which he had to cross before he could reach the road. Deceived by the looks of the ground he stepped into the cattle guard before he knew that he was so near it and was injured. *Held* that the falling in was the result of an accident and not the proximate result of being carried by the station and misinformed as to just where the train had stopped; that defendant's wrong was related to the injury only as it was the oc-

by the fact that the opposite doctrine "would sub- [*87] ject to a liability against which no prudence could guard,

casion of bringing plaintiff where the accident occurred. *Lewis v. Flint, etc., Ry. Co.*, 54 Mich. 55, 52 Am. Rep. 790. A man injured in a railroad accident became insane and eight months after the accident killed himself. The act of self-destruction was the proximate cause of the death. *Scheffer v. Railroad Co.*, 105 U. S. 249. Between a street and a river a railroad had filled in a space used for its tracks. A house across the street burnt because the fire hose could not reach the river across the tracks. The filling and use of the space was not the proximate cause of the injury. *Bosch v. Burlington, etc., R. R. Co.*, 44 Ia. 402, 24 Am. Rep. 754. A traveler having changed cars at a station entered a car upon the train he proposed to take and was ordered out as the train was not ready. He stood for a time on a track in the yard near the car and was struck by a train. Held the order to leave the car was not the proximate cause of the injury, the injured man having acted deliberately and without excitement or compulsion in taking his position where he did. *Henry v. St. Louis, etc., Ry. Co.*, 76 Mo. 288, 43 Am. Rep. 762. Defendant's cars ran off a siding belonging to a third person by reason of its defective construction, and injured plaintiff's boat. Its act in running on the defective track, not the defect in the track, was held the proximate cause. *Fawcett v. Railway Co.*, 24 W. Va. 755. Damage from loss of market is not the proximate result of delay in delivery of freight

by collision of vessels. *The Notting Hill*, L. R. 9 P. D. 105. A man knocked another down who was thereupon killed by the kick of a horse. The assault was not the proximate cause. *People v. Rockwell*, 39 Mich. 503. So where the jar caused by the sudden starting of a horse car threw a passenger to the pavement where a runaway horse struck her. *South Side, etc., Co. v. Trich*, 117 Pa. St. 390, 11 Atl. 627. A mule getting upon a railroad track from lack of a fence, ran along and caught its foot in a very small hole between the ties and was injured. Failure to fence was held not the proximate cause. *Nelson v. Chicago, etc., Ry. Co.*, 30 Minn. 74. See *Railroad Co. v. Guthrie*, 10 Lea, 432. A railway company unlawfully obstructed a highway with cars. While a traveler was waiting to pass, a train came in on the other side of the cars in a lawful manner. His horse took fright and he was injured. The obstruction of the street was held not the proximate cause. *Selleck v. Lake Shore, etc., Ry. Co.*, 58 Mich. 195. So, where to avoid the obstruction one drove around it where there was no crossing. *Jackson v. R. R. Co.*, 13 Lea, 491; and where cattle stopped on a track and were struck by another train properly handled, running on a parallel track. *Brown v. Wabash, etc., Ry. Co.*, 20 Mo. App. 222. See *Railway Co. v. Staley*, 41 Ohio St. 118, 52 Am. Rep. 74, where after passing round the end of the train a woman went upon another street and slipped in the dark on a pile

and to meet which no private fortune would be adequate," than by a strict regard to the logic of cause and effect.¹³

In Pennsylvania the same conclusion has been reached, and from similar considerations.¹⁴ But a different view prevails in

of ice. The sale contrary to statute of a pistol to a boy is not the proximate cause of his injury by it. *Poland v. Earhart*, 70 Ia. 285. *Contra*, *Binford v. Johnston*, 82 Ind. 426, without reference to statute, where cartridges were sold, and the boy's brother afterward shot him. The sale of liquor is not the proximate cause of the death of the buyer resulting from a wound received in an attack, when drunk, upon a house some miles from the place of sale. *Schmidt v. Mitchell*, 84 Ill. 195. It is not the proximate result of furnishing liquor to a minor that the clerk of a hotel where the minor boards injures his hand in knocking the latter down for assaulting him. *Swinfin v. Lowry*, 37 Minn. 345, 34 N. W. 22. See, also, *McCandless v. Chicago*, etc., Ry. Co., 71 Wis. 41, 36 N. W. 620. For further illustrations see *post*, pp. 128-137.

13—*Ryan v. N. Y. Cent. R. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49. This decision does not appear to have been entirely satisfactory in New York; at least, the courts in subsequent cases have not been very positive in planting themselves upon it. See *Webb v. Rome*, etc., R. R. Co., 49 N. Y. 420, 427-8, 10 Am. Rep. 389; *Pollett v. Long*, 56 N. Y. 200, 206. The *Ryan* case is expressly adhered to in *Read v. Nichols*, 118 N. Y. 224, 23 N. E. 463, 7 L. R. A. 130 and its principles applied in *Hoffman v. King*, 160 N. Y. 618, 55 N. E. 401,

73 Am. St. Rep. 715, 46 L. R. A. 672. In the latter case it is held that, where a railroad company is negligent in causing a fire on its right of way and the fire escapes to adjoining property, the right of recovery is limited to those whose property abuts on the right of way. But in *O'Neill v. New York*, etc., Ry. Co., 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591, the plaintiff was permitted to recover in such a case though the fire had spread to his property across the land of an intervening proprietor. So in *Martin v. New York*, etc., Ry. Co., 62 Hun, 181, 16 N. Y. S. 499. Coals from an engine on an elevated railroad fell on a horse in the street below. The horse ran and injured a traveler. The latter was allowed to recover from the railroad, distinguishing the *Ryan* Case and *Penn.*, etc., *Co. v. Kerr*, 62 Pa. St. 353, 1 Am. Rep. 431. *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158, 52 Am. Rep. 12. But where sparks from a mill set fire to another and from the latter the fire spread through several buildings to plaintiff's, he was not allowed to recover from the mill owner. *Reiper v. Nichols*, 31 Hun, 491. Where sparks from an engine set fire to the plaintiff's barn and from that the fire was communicated to his hotel thirty-nine feet away, the company was held liable for both. *Frace v. New York*, etc., R. R. Co., 68 Hun, 325, 22 N. Y. S. 958.

14—*Pennsylvania R. R. Co. v. Kerr*, 62 Pa. St. 353, 1 Am. Rep.

England and in most of the American states. The negligent fire is regarded as a unity: it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first; though if it had been stopped on the way and started anew by another person, a new cause would thus have intervened back of which any subsequent injury could not have been traced. Proximity of cause has no necessary connection with contiguity of space or nearness in time. The slow match which causes an

431. We should say that the weight of this case as a precedent was somewhat diminished by *Oil Creek, etc., R. R. Co. v. Keighron*, 74 Pa. St. 316, and *Pennsylvania R. R. Co. v. Hope*, 80 Pa. St. 373, 20 Am. Rep. 100. In the last mentioned case, proximate cause is held to be a question for the jury. To the same effect are also the following: *Lehigh, etc., R. R. Co. v. McKeen*, 90 Pa. St. 122, 35 Am. Rep. 644; *Haverly v. State Line, etc., R. R. Co.*, 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848; *Lake v. Milliken*, 62 Me., 240, 16 Am. Rep. 456; *Willey v. Belfast*, 61 Me. 569; *Railway Co. v. Kellogg*, 94 U. S. 469; *Adams v. Young*, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789; *Green Ridge R. R. Co. v. Brinkman*, 64 Md. 52, 54 Am. Rep. 755, and see cases *ante*, p. 111, note 8a. A train upon a track, over which ten minutes before an engine had safely passed, ran into a land slide and was wrecked. Oil upon the train ignited, ran into a river, then unusually swollen, which flowed by the side of the track and was carried down stream some distance, where it set fire to

plaintiff's building. In a suit against the railroad company, held that defendant's negligence in not seeing the land slide and stopping in time was not the proximate cause of plaintiff's damage; that the consequences could not have been foreseen as likely to flow from the act. *Hoag v. Lake Shore, etc., R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653. But where the oil was ignited by a collision, the opposite conclusion has been reached. *Kuhn v. Jewett*, 32 N. J. Eq. 647. Where one has negligently set his building on fire, if by reason of the wind as a new and independent agency another's house is burnt, the negligence has been held not the proximate cause of the latter's injury. *Penn. Co. v. Whitlock*, 99 Ind. 16. The contrary is held in *Lillibridge v. McCann*, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381. By a fire negligently lit adjoining property was set on fire. The injury received by a person in trying to put it out is not the proximate result. *Seale v. Gulf, etc., Co.*, 65 Tex. 274; *Hinchey v. Manhattan Ry. Co.*, 49 N. Y. Super. Ct. 406.

explosion after much time and at a considerable distance from the ignition, and the libelous letter which is carried from place to place by different hands before publication, produces an injurious result which is as proximate to the cause and as direct a sequence as if in the one case the explosion had been instantaneous, and in the other the author had called his neighbors together and read to them his libel.¹⁵

*4. A fourth proposition may be stated thus: That if [*89] the damage has resulted directly from concurrent wrong-

15—See *Smith v. London, etc.*, R. R. Co., L. R. 5 C. P. 98; *Perley v. Eastern R. R. Co.*, 98 Mass. 414; *Clemens v. Hannibal, etc.*, R. R. Co., 53 Mo. 366, 14 Am. R. 460; *Poeppers v. Miss., etc.*, Ry. Co., 67 Mo. 715, 29 Am. Rep. 518; *Hoyt v. Jeffers*, 30 Mich. 181; *Fent v. Toledo, etc.*, R. R. Co., 59 Ill. 349, 14 Am. Rep. 13; *Toledo, etc.*, R. R. Co. v. *Muthersbaugh*, 71 Ill. 572; *Annapolis, etc.*, R. R. Co. v. *Gantt*, 39 Md. 115; *Baltimore, etc.*, R. R. Co. v. *Reaney*, 42 Md. 117; *Kellogg v. Chicago, etc.*, R. R. Co., 26 Wis. 223, 7 Am. Rep. 69; *Atkinson v. Goodrich, Tr. Co.*, 60 Wis. 141, 50 Am. Rep. 352; *Crandall v. Goodrich, Tr. Co.*, 16 Fed. Rep. 75; *Hooksett v. Concord R. R.*, 38 N. H. 242; *Atchison, etc.*, R. R. Co. v. *Stanford*, 12 Kan. 354, 15 Am. R. 362; *Milwaukee, etc.*, R. R. Co. v. *Kellogg*, 94 U. S. 469; *Delaware, etc.*, R. R. Co. v. *Salmon*, 39 N. J. 299, 23 Am. Rep. 214; *Louisville, etc.*, Ry. Co. v. *Krinning*, 87 Ind. 351; *Johnson v. Chicago, etc.*, Ry. Co., 31 Minn. 57; *Small v. Chicago, etc.*, R. R. Co., 55 Ia. 582; *Krippner v. Biebl*, 28 Minn. 139, where a fire smouldered for two days in a slough; *Louisville, etc.*, Ry. Co. v. *Nitshe*, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750; *Cincinnati, etc.*, R.

R. Co. v. *Baker*, 94 Ky. 71, 21 S. W. 347; *Alabama, etc.*, Ry. Co. v. *Barrett*, 78 Miss. 432, 28 So. 820; *Gram v. Northern Pac. R. R. Co.*, 1 N. D. 252, 46 N. W. 972; *Tyler v. Ricamore*, 87 Va. 466, 12 S. E. 799; *East Tennessee, etc.*, Ry. Co. v. *Hesters*, 90 Ga. 11, 15 S. E. 828; *Lillibridge v. McCann*, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381; *Phillips v. Railroad Co.*, 138 N. C. 12.

Where the defendant negligently started a prairie fire which escaped to the plaintiff's land and the plaintiff started a back fire to save his buildings, and was driven off by the defendant's fire and the back fire spread to his buildings, but the same would have been set on fire a few minutes later by the defendant's fire, the latter was held the proximate cause of the destruction of the plaintiff's buildings. *McKenna v. Boessler*, 86 Ia. 197, 53 N. W. 103, 17 L. R. A. 310. Where fire was communicated to the defendant's peat land and some of his stock were injured by getting into the burning peat, the defendant's negligence in starting the fire was held the proximate cause of the injury to the stock. *Chicago, etc.*, Ry. Co. v. *Willard*, 111 Ill. App. 225.

In *Annapolis, etc.*, R. R. Co. v.

ful acts or neglects of two persons, each of these acts may [*90] be *counted on as the wrongful cause, and the parties held

Gantt, 39 Md. 115, 141, BARTOL, Ch. J., says: "It is contended on the part of the appellant that, for such injury, the company is not liable under the code, because it was the *remote*, and not the *proximate*, consequence of the defendant's negligence. In support of this proposition we have been referred to Ryan v. N. Y. Central R. R. Co., 35 N. Y. 210, and Penn. R. R. Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431.

"In those cases it was held that 'where the fire is communicated by the locomotive to the house of A., and thence to the house of B., there can be no recovery by the latter,' and the decisions are based upon the ground that the fire from the locomotive is not the proximate cause of the destruction of B.'s house; and his injury being only the remote and indirect result of the wrongful act of the defendant, he cannot maintain an action, according to the maxim, *causa proxima non remota spectatur*. There is no rule of the law better established or more universally recognized. Whether it was correctly applied in the cases above cited, it is not material for us now to consider; because it is obvious that the facts in the present case clearly distinguish it from those.

"It may be proper to observe that the decisions in 15 N. Y. and 62 Penn. are not supported by any English case that we have seen, and are in conflict with several decisions both in England and in this country, which have been cited in argument by the appellee. Among

them we may refer to Piggott v. Eastern Counties R. Co., 3 M. G. and S. 229; Smith v. L. & S. R. R. Co., L. R. 5 C. P. 98; Perley v. Eastern R. R. Co., 98 Mass. 418, 96 Am. Dec. 414; Hart v. Western R. R. Co., 13 Met. 99, 46 Am. Dec. 719; Fent v. Toledo, etc., R. R. Co., 59 Ill. 349, 14 Am. Rep. 13.

"Without attempting to reconcile the various decisions, which would be a fruitless and unprofitable task, or undertaking to define for all possible cases the exact limits and extent of the liability of railroad companies under our code, for damages by fire occasioned by their engines and carriages, we may safely state the rule to be, that when their liability arises it extends to "all the near and natural consequences of their wrongful act, and not to those which are remote, incidental or exceptional.' Law Reg. Sep., No. 1873, p. 560, Judge Redfield's note. The rule is thus stated by Parsons: 'The defendant is held liable for all those consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration.' 2 Pars. on Cont. 456. The rule is laid down substantially in the same terms by POLLOCK, C. B., in Rigby v. Hewitt, 5 Exch. 240. Other definitions might be cited from Judges and text writers; but this would serve no useful purpose. The rule is one which, from its nature and the class of cases where it applies, is

responsible, either jointly or severally, for the injury.¹⁶ "It is well settled by the adjudged cases that when an injury is the result of the combined negligence of the defendant and the negligent or wrongful act of a third person, for whose act neither

incapable of precise definition. It has been correctly said by MILLER, J., speaking for the Supreme Court, 'If we could deduce from the cases the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations.' He adds, 'One of the most valuable *criteria* furnished us by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.' *Ins. Co. v. Tweed*, 7 Wall. 52. To apply this criterion to the case before us, it seems too plain for argument that * * the injury to the plaintiff's property was the direct consequence of the fire occasioned by the defendant's locomotive. The fact that the fire began on the side of the railroad and spread to the plaintiff's land, cannot in any just sense be said to render the injury suffered by him of a nature merely remote and incidental within the meaning of the rule. The fire consumed his property in its natural and direct course, without any 'intervening force or power to stand as the cause of the misfortune,' and the injury suffered was therefore its proximate effect.

"No case has been cited which sustains the defense here made by

the appellant. In *Woodruff's Case*, 4 Md. 242, the fire happened in the same way, and neither court nor counsel thought of applying the rule of *causa remota*. So in *B. & O. R. R. Co. v. Dorsey*, 37 Md. 19, the fire originated in the same way, and it was not pretended that the injury to the plaintiff was not a proximate consequence of the defendant's negligence. The language of the court (p. 24) would seem conclusive of the question, as it is here presented. We may refer also to *Field v. N. Y. Central R. R. Co.*, 32 N. Y. 339, where the question was ruled in the same way by the same court which subsequently decided *Ryan v. N. Y. Central R. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49." See also, *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63. An ordinary wind is not an independent cause. *Poeppers v. Miss.*, etc., *Ry. Co.*, 67 Mo. 715, 29 Am. Rep. 518; *Krippner v. Biehl*, 28 Minn. 139. Nor is the leaving of shavings in a mill yard. *Atkinson v. Goodrich Tr. Co.*, 60 Wis. 141, 50 Am. Rep. 352; *Crandall v. Goodrich Tr. Co.*, 16 Fed. Rep. 75. Nor the failure of the person damaged to extinguish the fire. *Wiley v. West Jersey R. R. Co.*, 44 N. J. L. 247.

16—*Lynch v. Nurdin*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 C. & P. 190; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Chapman v. N. H.*, etc., *R. R. Co.*, 19 N. Y. 341, 75 Am. Dec. 344; *Colegrove v. N. Y.*, etc., *R. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418; *Bar-*

the plaintiff nor the defendant is responsible, the defendant is liable, when the injury would not have happened except for his

rett v. Third Av. R. R. Co., 45 N. Y. 628; *Griggs v. Fleckenstein*, 14 Minn. 81, 100 Am. Dec. 199; *Powell v. Deveney*, 3 Cush. 300, 50 Am. Dec. 738; *Lane v. Atlantic Works*, 107 Mass. 104; *Weick v. Lander*, 75 Ill. 93; *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267; *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456; *Western Railway v. Sistrunk*, 85 Ala. 352, 5 So. 79; *Georgia Pac. Ry. Co. v. Hughes*, 87 Ala. 610, 6 So. 413; *Colorado Mort. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42; *Ashborn v. Waterbury*, 70 Conn. 551, 40 Atl. 458; *Jacksonville, etc., Ry. Co. v. Peninsular, etc., Co.*, 27 Fla. 1, 9 So. 666, 17 L. R. A. 33; *McGary v. West Chicago St. R. R. Co.*, 85 Ill. App. 610; *Burk v. Creamery Package Mfg. Co.*, 126 Ia. 730, 102 N. W. 793, 106 Am. St. Rep. 377; *Murray v. Boston Ice Co.*, 180 Mass. 165, 61 N. E. 1001; *Johnson v. N. W. Tel. Exchange Co.*, 48 Minn. 433, 51 N. W. 225; *Newcomb v. New York Central, etc., R. R. Co.*, 169 Mo. 409, 69 S. W. 348; *Gulf, etc., Ry. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755; *Croft v. N. W. S. S. Co.*, 20 Wash. 175, 55 Pac. 42. A man entitled to the use of 400 inches of water in a stream was by the action of the several defendants independently deprived of his rights. No one defendant would perhaps by his use of the water have so reduced the amount as to injure the plaintiff. *Held*, they were jointly liable to him. *Hillman v. Newington*, 57 Cal. 56. So where defendant negligently allowed water to run into a cellar into which by another's independent negligence other water ran.

From the cellar the water came into plaintiff's cellar to his injury. The defendant was held liable for the whole damage. *Slater v. Mersereau*, 64 N. Y. 138.

So in cases of injury to passengers of one carrier by collision with cars or vessel of another where both are at fault, each is liable. *Kellow v. Centr. Ia. Ry. Co.*, 68 Ia. 470; *Pittsburgh, etc., Co. v. Spencer*, 98 Ind. 186; *Tompkins v. Clay St. R. R. Co.*, 66 Cal. 164; *Wabash, etc., Co. v. Shacklett*, 105 Ill. 364, 44 Am. Rep. 791; *Cuddy v. Horn*, 46 Mich. 596; *Georgia Pac. Ry. Co. v. Hughes*, 87 Ala. 610, 6 So. 413; *Murray v. Boston Ice Co.*, 180 Mass. 165; 61 N. E. 1001; and see *post*, pp. 128-137. So where the injury arises from a defective joint station platform, *Wabash, etc., Co. v. Wolff*, 13 Ill. App. 437. So, though as between themselves one carrier was wholly to blame, a joint action has been sustained. *Cooper v. Eastern Tr. Co.*, 75 N. Y. 116.

Servants of a railroad company needlessly and negligently placed signal torpedoes on the track where the public had been accustomed to pass. A lad picked one up and carried it away and in playing with it exploded it to the injury of plaintiff. Following *Lynch v. Nurdin* and citing many cases, the court held that plaintiff was not chargeable with the boy's negligence; that defendant's negligence having rendered the injury possible and probable was the proximate cause thereof. *Harri-man v. Pittsburgh, etc., Co.*, 45 Ohio St. 11, 12 N. E. 451.

negligence.’¹⁷ Thus, if two persons wrongfully block up a street, so that *one is injured in attempting to pass them, [*91] neither of the culpable parties can excuse himself by showing the wrong of the other, for the injury is a natural and proximate result of his own act under the then existing circumstances, and to excuse either would be to deny all remedy in the case of plain and palpable injury. But if the acts or neglects were not concurrent in time, and the party last in fault was chargeable with some duty to the other which, if performed, would have prevented the injury, the law will attribute to his culpable conduct the injurious consequence, and refuse to look beyond it. For illustration the case may be instanced of the escape of gas into a dwelling in consequence of the negligence of the gas company, and the subsequent ignition of the gas through the negligence of a tenant. “If the tenant, upon discovering the presence of gas in large quantity in the house, neglected to give notice to the agents or servants of the defendant, or to take reasonable precautions to remove or exclude the gas, and recklessly brought the flame of a candle in contact with it, thus bringing about injurious effects which would not have followed but for such reckless or negligent conduct on his part, the defendant ought not to be held responsible for those results.¹⁸ Whatever of care was requisite for the protection of the premises under the circumstances was due from the occupant. The defendant, as well as the plaintiff, had a right to expect and require it of him. The measure of duty and the extent of liability of the defendant in respect to the property exposed to injury are not affected by the consideration whether the occupant who has charge of it is in

17—Colorado Mort. & Invest. Co. v. Rees, 21 Colo. 435, 42 Pac. 42. “When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes.” *Ashborn v. Waterbury*, 70 Conn. 551, 40 Atl. 458;

Ring v. Cohoes, 77 N. Y. 83. For similar expressions see *Western Railway v. Sistrunk*, 85 Ala. 352, 5 So. 79; *Gulf, etc., Ry. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755.

18—Citing *Hunt v. Lowell Gaslight Co.*, 1 Allen, 343; *Sherman v. Fall River Iron Works*, 2 Allen, 524, 79 Am. Dec. 799.

fact owner in fee or tenant for years or at will. If the intervening misconduct of the occupant produced the explosion which was the immediate cause of the injury to the building, the plaintiff cannot charge the legal responsibility for that result upon the original negligent act or omission of the defendant."¹⁹ In a subsequent case in the same court where the plaintiff was injured by an explosion of gas in the Boston subway, it was held that, if the defendant company was negligent in suffering the gas to escape, then its negligence was the proximate cause of the injury, though the gas was set off by an electric car, or by a third person, or by natural causes, provided such ignition of the gas ought to have been foreseen as a probability.²⁰ A Pennsylvania case is to the same effect.²¹ Another illustration may be added. The plaintiff's colt got into the defendant's lot through a fence which the defendant negligently suffered to be out of repair and insufficient. A stranger, in attempting to drive the colt back, negligently caused him to run into a barbed wire fence whereby he was injured. It was held to be a case of concurrent negligence and that both or either of the negligent parties were liable.²² So where a servant is injured by the concurrent negligence of the master and a fellow servant, the master is liable.²³

A proximate cause has been aptly defined as "one which in natural sequence, undisturbed by any independent cause, produces the result complained of."²⁴ To be proximate the cause must be one without which the accident or injury would not have

19—WILLS, J., in *Bartlett v. Boston Gaslight Co.*, 117 Mass. 533, 538, 19 Am. Rep. 421.

20—*Koplan v. Boston Gaslight Co.*, 177 Mass. 15, 58 N. E. 183.

21—*Koelsch v. Phila. Co.*, 152 Pa. St. 355, 35 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759.

22—*Wilder v. Stanley*, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479.

23—*Denver, etc., R. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093; *Pullman Pal. Car. Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A.

215; *Armour v. Golkowska*, 202 Ill. 144, 66 N. E. 1037; *Kaiser v. Flaccus*, 138 Pa. St. 332, 22 Atl. 88; *Fort Worth, etc., Ry. Co. v. Mackney*, 83 Tex. 410, 18 S. W. 949.

24—*Behling v. S. W. Penn. Pipe Lines*, 160 Pa. St. 359, 28 Atl. 777, 40 Am. St. Rep. 724. And see *Lake Erie, etc., R. R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923; *Gudfelder v. Pittsburg, etc., Ry. Co.*, 207 Pa. St. 629, 57 Atl. 70.

occurred.²⁵ It is frequently said that, in order that an act or omission shall be the proximate cause of an injury, the injury must be the natural and probable consequence of the act or omission and such as an ordinarily reasonable and prudent man, under the given circumstances, might and ought to have foreseen in advance. Thus the supreme court of Pennsylvania says: "In determining what is proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence, as under the surrounding circumstances of the case might and ought to have been foreseen by the wrong-doer as likely to flow from his act."²⁶ This language, in substance, has been repeated in many cases in that state.²⁷ Similar forms of expression will be found in many other cases.²⁸ According to these authorities the question of proximate cause depends upon whether the injury complained of could have been foreseen as likely to result from the negligence charged. But negligence is often held the proximate cause of an injury which follows in unbroken sequence, though the actual result might have seemed improbable in advance, and this by the same courts which give the rule as above stated.²⁹

25—*Taylor v. Baldwin*, 73 Cal. 517, 21 Pac. 124; *Chattanooga L. & P. Co. v. Hodges*, 109 Tenn. 331, 70 S. W. 616, 97 Am. St. Rep. 844, 60 L. R. A. 459.

26—*South Side Pass. Ry. Co. v. Trich*, 117 Pa. St. 390, 11 Atl. 627, 2 Am. St. Rep. 672.

27—*Hoag v. Lake Shore, etc., R. Co.*, 85 Pa. St. 293; *Haverly v. State Line, etc., R. R. Co.*, 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848; *Scott v. Allegheny Val. R. R. Co.*, 172 Pa. St. 646, 33 Atl. 712; *Thomas v. Central R. R. Co.*, 194 Pa. St. 511, 45 Atl. 344.

28—*Macon v. Dykes*, 103 Ga. 847, 31 S. E. 443; *American Express Co. v. Risley*, 77 Ill. App. 476; *Hurley v. Packard*, 152 Mass. 216, 65

N. E. 64; *Gonzales v. Galveston*, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365; *Diesenrieter v. Malting Co.*, 97 Wis. 279, 72 N. W. 735. "A person guilty of negligence, or an unlawful act, should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, would at the time of the negligent or unlawful act have thought reasonably to follow, if they had occurred to his mind." *Wabash R. R. Co. v. Coker*, 81 Ill. App. 660, 664.

29—*Chicago, etc., Ry. Co. v. Wilbard*, 111 Ill. App. 225; *Bunting v.*

In one of the cases cited the defendants had a private railroad track which was built on a curve and so as to cross a main line of road twice within a short distance. For convenience of description the crossings may be designated as A and B. The defendant's engineer was negligently backing a dinkey engine, with a car of coke attached, towards the crossing at A, just as a passenger train was approaching the crossing. The defendant's engineer, thinking a collision imminent, shut off steam and jumped from his engine. The passenger train collided with the car of coke and came to a stop at the crossing at B. The effect of the collision was to open the valve of the dinkey engine which started towards the crossing at B, collided with the car in which the plaintiff was riding and produced the injuries sued for. The engineer's negligence in backing his engine towards the first crossing in view of the approaching train was held to be the proximate cause of the plaintiff's injuries, though such a result would have seemed improbable in advance. The engineer's negligence directly caused his peril, his jump from the engine and the first collision. The first collision opened the valve of the engine which set it in motion towards the second crossing and so caused the second collision and the second collision caused the plaintiff's injuries. The court says: "The engineer would be held to have foreseen whatever consequences might ensue from his negligence without some other independent agency, and both his employer and himself would be held for what might, in the nature of things, occur in consequence of that negligence, although, in advance, the actual result might have seemed improbable."³⁰ In another case the servants of a railroad company while shifting cars burst open two tank cars filled with naphtha. The naphtha ran out and into a sewer. They continued to move the cars while the naphtha was running out and in passing a switch light the naphtha caught on fire. The fire followed the

Hogsett, 139 Pa. St. 363, 21 Atl. 31, Pa. St. 388, 21 Atl. 827, 24 Am. St. 23 Am. St. Rep. 192, 12 L. R. A. Rep. 504.
 268; *Gudfelder v. Pittsburg, etc.*, 30—*Bunting v. Hogsett*, 139 Pa. Ry. Co., 207 Pa. St. 629, 57 Atl. St. 363, 374, 375, 21 Atl. 31, 23 Am. St. Rep. 192, 12 L. R. A. 268.
 70; *Quigley v. Del. & H. C. Co.*, 142

naphtha to the sewer and along the sewer 2,800 feet to its outlet near a bridge and there caused a violent explosion which injured plaintiff on the bridge. A judgment for the plaintiff was affirmed. "The wrongful act (of moving the cars near the light) and its injurious effects were connected by an unbroken and continuous succession of events which made the consequence the immediate and natural result of the act unaffected by any efficient intermediate cause."³¹

According to these illustrations, negligence is the proximate cause of whatever results therefrom by an unbroken chain of cause and effect, whether the particular result was reasonably to be anticipated or not. Some cases would qualify this by requiring the negligence to be such that some injury would be likely to result therefrom. That is if negligence is such that some injury is likely to result therefrom, then it is the proximate cause of whatever injury does actually so result.³²

31—*Gudfelder v. Pittsburg, etc., Ry. Co.*, 207 Pa. St. 629, 57 Atl. 70.

32—*Dixon v. Scott*, 181 Ill. 116, 54 N. E. 897; *Texas, etc., Ry. Co. v. Carlin*, 111 Fed. 777, 49 C. C. A. 605; *Fottler v. Moseley*, 185 Mass. 563, 70 N. E. 1040. The question of proximate cause is elaborately considered in *Drum v. Miller*, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, from which we quote as follows: "There is a distinction, we think, between the case of an injury inflicted in the performance of a lawful act and one in which the act causing the injury is in itself unlawful or is, at least, a wilful wrong. In the latter case the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not; but when the act is lawful, the liability depends not upon the particular consequence or result that

may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act. * * * For the purpose, therefore, of civil liability, in the law of torts, those consequences and those only are deemed immediate and proximate or natural and probable which a person of average competence and knowledge, being in like case of a person whose conduct is in question and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. * * *

"While, as we have said, a person charged with negligence is liable only for those injuries which a prudent man in the exercise of care could reasonably have foreseen or expected as the natural and probable consequence of his act or his omission of duty, it

It may be a question whether there has not been a confusion of what constitutes probable cause with what constitutes negligence. Upon this point we quote from the supreme court of Minnesota as follows: "What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrong-doer is responsible, even though he could not have foreseen the particular results which did follow."³³

Additional Illustrations on the Subject of Proximate Cause.

A brakeman on a freight train had a defective lantern which was liable to go out in the wind. In giving a signal the lantern went out and he started forward to the engine to relight and

must not be supposed that the principle thus stated requires that he should have been able to foresee the injury in the precise form in which it in fact resulted, or to anticipate the particular consequence which actually flowed from his act or omission of duty."

33—*Christianson v. Chicago, etc., Ry. Co.*, 67 Minn. 94, 69 N. W. 640. Some cases appear to be disposed of on the ground that the act complained of is not the proximate

cause of the injury, where the real ground of the decision seems to be that the act in question is not negligence. See *Missouri Pac. Ry. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Murphy v. New York*, 89 App. Div. 93, 85 N. Y. S. 445; *Scott v. Allegheny Val. R. R. Co.*, 172 Pa. St. 646, 33 Atl. 712; *Stone v. Boston & A. R. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

was thrown under the wheels by the sudden stopping of the train. The negligence of the company in supplying him with a defective lantern was held to be the proximate cause of his injury.³⁴ Car doors were left open and the cars became cold. Plaintiff shut the forward door and, in attempting to shut the rear door, was thrown out by a lurch of the train and injured. Negligence in leaving the doors open was the proximate cause.³⁵ A merchant sent out a cart to deliver parcels, with a servant to drive and a lad to deliver the parcels, who was forbidden to drive. The driver left the cart and went after oil for his lamp. While he was gone the lad turned the cart about and in doing so negligently injured the plaintiff. The negligence of the driver in leaving the cart was held to be the efficient cause of the accident.³⁶ In the following cases the negligence indicated was held to be the proximate cause of the injury sustained: A street car suddenly stopped in the middle of a block in violation of an ordinance and immediately in front of a funeral procession. The first carriage was brought to a sudden halt and the pole of the second carriage thrust through the back of the first and injured the plaintiff.³⁷ An engineer was killed by the derailing of his engine by a bull on the track which had come in through a defective fence which the company had negligently permitted to be out of repair.³⁸ The defendant's servants negligently threw snow against a telephone wire, causing it to break and fall across a trolley wire, whereby it became charged with electricity, and plaintiff's mule coming in contact with the wire on the street was killed.³⁹ A steamer was negligently run against the pier of a drawbridge. A stampede of passengers followed and the plaintiff was thrown down and trampled on.⁴⁰ The servants of a railroad company

34—*Pennsylvania Co. v. Congdon*, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251. *Simmons v. East Tennessee, etc., Ry. Co.*, 92 Ga. 658, 18 S. E. 999, is a similar case.

35—*Denver, etc., R. R. Co. v. Bedell*, 11 Colo. App. 139, 54 Pac. 280.

36—*Engelhart v. Farrant*, (1897) 1 Q. B. 240.

37—*Mueller v. Milwaukee St. Ry. Co.*, 86 Wis. 340, 56 N. W. 914, 21 L. R. A. 721.

38—*Dickson v. Omaha, etc., R. R. Co.*, 124 Mo. 140, 27 S. W. 476.

39—*Jones v. Finch*, 128 Ala. 217, 29 So. 182.

40—*Southern Trans. Co. v. Harper*, 118 Ga. 672, 45 S. E. 458.

negligently left an unexploded torpedo on the track in a populous place. A boy picked it up and exploded it and he and others were injured.⁴¹ A lower tenant negligently obstructed with boxes a stairway leading to the upper floors. A fire occurred and the upper tenant was obliged to get out of the window and was hurt in so doing.^{41a}

A woman while in the act of boarding a street car was thrown and injured by the negligent starting of the car. The next day symptoms of premature child birth developed and a miscarriage occurred a few days later, followed by tetanus and death. The evidence showed that tetanus was liable to follow child birth and especially a miscarriage. Whether the negligence was the proximate cause of death was held to be for the jury.⁴² Where the act is wilful and malicious the wrong-doer is liable for all the actual consequences, whether probable or not.⁴³

Where an injury is due to a defect in a street or highway in conjunction with the fright of a horse, the defect is generally held to be the proximate cause.⁴⁴ In one of the cases cited it is said:

41—*Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; *Pittsburg, etc., Ry. Co. v. Shields*, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464.

41a—*Cohn v. May*, 210 Pa. St. 615, 105 Am. St. Rep. 840.

42—*Brashear v. Phila. Traction Co.*, 180 Pa. St. 392, 36 Atl. 914.

43—*Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. 585, 67 Am. St. Rep. 691, 45 L. R. A. 87; *McGehee v. McCarley*, 91 Fed. 462, 33 C. C. A. 629.

44—*Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621; *Joliet v. Shufeldt*, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 453, 18 L. R. A. 750; *Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440; *Belleville v. Hoffman*, 74 Ill. App. 503; *Board of Coms. v. Mutchler*, 137 Ind. 140, 36

N. E. 534; *Hazzard v. Council Bluffs*, 79 Ia. 106, 44 N. W. 219; *Byerly v. Anamosa*, 79 Ia. 204, 44 N. W. 359; *Langhammer v. Manchester*, 99 Ia. 295, 68 N. W. 688; *Walrod v. Webster Co.*, 110 Ia. 349, 81 N. W. 98, 47 L. R. A. 480; *Union St. Ry. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *Voglesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653; *Stone v. Pendleton*, 21 R. I. 332, 43 Atl. 643; *Taylor v. Ballard*, 24 Wash. 191, 64 Pac. 143; *Gray v. Washington Water Pow. Co.*, 27 Wash. 713, 68 Pac. 360. In *Joliet v. Shufeldt*, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 453, 18 L. R. A. 750, the court says: "The general doctrine is, that it is no defense, in actions for injuries resulting from negligence, that the negligence of third persons, or an inevitable accident, or that

"When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided that the injury would not have been sustained but for the defect."⁴⁵

But the authorities are not uniform and some hold that the defect is not the proximate cause in such cases.⁴⁶ In West Virginia where a horse was frightened by a pile of rocks in the road and ran off an embankment where there was no guard rail the town was held liable.⁴⁷ But in a case similar in its facts, except that the horse was frightened by a yoke of calves backing out of the brushes, it was held there was no liability.⁴⁸ In Michigan where a horse was frightened at a hole in a bridge and went off for lack of a railing, the latter defect was held the proximate cause.⁴⁹ So where the horse stumbled and became unmanageable.⁵⁰ But where the plaintiff stopped to talk, when just across

an inanimate thing contributed to cause the injury to the plaintiff, if the negligence of the defendant was an efficient cause, without which the injury would not have occurred." P. 410.

45—*Langhammer v. Manchester*, 99 Ia. 295, 68 N. W. 688. But in the same state where a horse dropped dead on a bridge and fell against a railing which gave way and the horse fell off, dragging the sleigh and plaintiff after him, it was held that the defective railing was not the proximate cause. *McClain v. Garden Grove*, 83 Ia. 235, 48 N. W. 1031, 12 L. R. A. 482. So in another case where the defendant wrongfully built a wire fence eleven feet into a highway and within six feet of the traveled path, and the plaintiff's horse, which he was riding past in the night, shied and brought him in contact with the fence. The injur-

ies were not the proximate result of the wrongful location of the fence. *Anderson v. Schurke*, 121 Ia. 340, 96 N. W. 862, 100 Am. St. Rep. 358.

46—*La Londe v. Peake*, 82 Minn. 124, 84 N. W. 724; *Brown v. Laurens Co.*, 38 S. C. 282, 17 S. E. 21. And see *Macon v. Dykes*, 103 Ga. 847, 31 S. E. 443; *Neely v. Ft. Worth, etc., Ry. Co.*, 96 Tex. 274, 72 S. W. 159.

47—*Rohrbough v. Barbour Co. Ct.*, 39 W. Va. 472, 20 S. E. 565, 45 Am. St. Rep. 925.

48—*Smith v. County Court*, 33 W. Va. 713, 11 S. E. 1. To the same effect is *Hungerman v. Wheeling*, 46 W. Va. 761, 34 S. E. 778.

49—*White v. Riley*, 113 Mich. 295, 71 N. W. 502.

50—*Shaw v. Saline*, 113 Mich. 342, 71 N. W. 642.

a bridge and the check rein got under the shaft and the horse backed onto and off the bridge, the absence of a railing was held not to be the proximate cause.⁵¹

The question has been much considered in Pennsylvania and apparently with varying results. In one case a horse fell on a good road and, in his struggles to get up, went off an unguarded embankment, dragging after him the vehicle in which the plaintiff was riding. The fall of the horse and not the absence of a railing was held to be the proximate cause of the accident.⁵² The same holding was made in another case where a horse took fright at a load of tin cans, turned about and broke a wheel which dragged on the ground until it dropped into a hole in the street, negligently left by the municipality, and the occupants of the vehicle were thrown out.⁵³ So where, just after the plaintiff had driven across a bridge, the traces broke and the wagon ran back

51—*Kingsley v. Bloomingdale*, 109 Mich. 340, 67 N. W. 333. And see *Bleil v. Detroit St. Ry. Co.*, 98 Mich. 228, 57 N. W. 117; *Lambeck v. Grand Rapids, etc., R. R. Co.*, 106 Mich. 512, 64 N. W. 479.

52—*Herr v. Lebanon*, 149 Pa. St. 222, 24 Atl. 207, 34 Am. St. Rep. 603, 16 L. R. A. 106. The court says: "If two distinct causes are operating at the same time to produce a given result, which might be produced by either, they are concurrent causes. They run together, as the word signifies, to the same end. But if two distinct causes are successive and unrelated in their operation they cannot be concurring. One of them must then be the proximate, and the other the remote, cause. When they stand in this relation to each other and the result to be considered, the law regards the proximate as the efficient and responsible cause, and disregards the remote.

"To determine the relation which the fall of the horse in this case bears to the negligence of the city, we must remember that the jury have found that they bear no relation to each other; for they said, in answer to the question of the court, that the fall of the horse is not chargeable to the city. It is therefore, an independent unrelated cause, without which the accident would not have happened. It was the first, or proximate, cause in the series; the efficient and responsible cause.

"The absence of the barriers was the remote cause. It did not bring about, or help bring about, the accident, although it made its consequences more serious." P. 227.

53—*Jackson Tp. v. Wagner*, 127 Pa. St. 184, 17 Atl. 903, 14 Am. St. Rep. 833; *Wagner v. Jackson Tp.*, 133 Pa. St. 61, 19 Atl. 312; *Schoeffler v. Jackson Tp.*, 150 Pa. St. 145, 24 Atl. 629, 30 Am. St. Rep. 792, 18 L. R. A. 100.

on a down grade and off the bridge, the absence of a railing was held not to be the proximate cause.⁵⁴

On the other hand where, just after crossing a bridge, the plaintiff stopped to get a hat that had been lost out and the horse became frightened and backed off the bridge, the absence of a railing was held to be the proximate cause of the accident.⁵⁵ At a point in the road where there was a steep, unguarded embankment, a horse kicked his leg over the trace, took fright and plunged down the embankment, killing the driver and injuring the wife. The township was held liable.⁵⁶ And where a horse on a ferry boat was frightened by the whistle of another boat and, backing against a defective railing, went overboard, the defective railing was held the proximate cause.⁵⁷ In general it may be said that the earlier and the later decisions in this state favor a recovery in such cases, holding the defect to be the proximate cause of the injury.⁵⁸

54—*Willis v. Armstrong County*, 183 Pa. St. 184, 38 Atl. 621. *Card v. Columbia Tp.*, 191 Pa. St. 254, 43 Atl. 217, is a similar case in which the same ruling was made.

55—*Yoders v. Amwell Tp.*, 172 Pa. St. 447, 33 Atl. 1017, 51 Am. St. Rep. 750. The court says: "The township authorities were bound to foresee and reasonably provide against a common danger to ordinary travel on that highway; it is well known that one of such dangers arises from the habit of fright in the horse, and it is just as well known that when affrighted no one can foretell his conduct; the presence of guard rails would have been a protection from the danger of going over the bridge, no matter what the movement of the horse; therefore the habit of the horse being known, they ought to have put up the guard rails, and their neglect of

duty in this particular was the proximate cause of the injury." P. 455. The same ruling was made upon similar facts in *Bitting v. Maxatawny Tp.*, 177 Pa. St. 213, 35 Atl. 715.

56—*Boone v. East Norwegian Tp.*, 192 Pa. St. 206, 43 Atl. 1025. The court says: "It must be confessed that there is some embarrassment in the disposition of cases of this character, growing mainly out of the fact that the injury suffered results from the act of an unruly horse owned and controlled by the party injured at the moment of the accident."

57—*Sturges v. Kountz*, 165 Pa. St. 358, 30 Atl. 976, 27 L. R. A. 390.

58—*Macungie Tp. v. Mutchofer*, 71 Pa. St. 276; *Newlin Tp. v. Davis*, 77 Pa. St. 317; *Hey v. Phila.*, 81 Pa. St. 44; *Scott Tp. v. Montgomery*, 95 Pa. St. 444; *Bur-*

Where a horse is frightened by the negligence of defendant, such negligence is the proximate cause of any injury the runaway may do, either to himself, the vehicle attached, the occupants of the vehicle, or to the persons or property of third parties.⁵⁹ Where the shying of a horse brought the vehicle in collision with a train unlawfully obstructing a crossing, the unlawful obstruction was held to be the proximate cause of the accident.⁶⁰

Where a woman was injured by burns and made sick by over exertion in endeavoring to save her property from destruction by a fire negligently set out by the defendant, it was held that, if the plaintiff acted with reasonable prudence, the defendant's negligence was the proximate cause of her injuries.⁶¹ But the au-

rell Tp. v. Uncapher, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 564; Quinlan v. Phila., 205 Pa. St. 309, 54 Atl. 1026; Davis v. Snyder Tp., 196 Pa. St. 273, 46 Atl. 301; Nichols v. Pittsfield Tp., 209 Pa. St. 240, 58 Atl. 283.

59—Railway Co. v. Roberts, 56 Ark. 387, 19 S. W. 1055; Thomas v. Royster, 98 Ky. 206, 32 S. W. 613; Smethurst v. Barton Square Church, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 550, 2 L. R. A. 695. But where a horse was frightened by the negligent operation of a steam roller and ruptured a blood vessel which caused his death, it was held that the negligence was not the proximate cause of the death of the horse. Lee v. Burlington, 113 Ia. 356, 85 N. W. 618, 86 Am. St. Rep. 379.

60—Chicago, etc., Ry. Co. v. Prescott, 59 Fed. 237, 8 C. C. A. 109. But where a train unlawfully obstructed a crossing more than ten minutes and a person waiting for the train to move was injured by a runaway team the company was held not liable, obstructing the

crossing not being the proximate cause of the accident. Wabash R. Co. v. Coker, 81 Ill. App. 660.

61—Glanz v. Chicago, etc., Ry. Co., 119 Ia. 611, 93 N. W. 575. The court says: "In attempting to extinguish the fire in question, plaintiff was in the strict line of her duty; and, if she acted with ordinary care and prudence, there is no reason, in justice or law, why she should not recover for the injuries received. Bound as she was by law to save herself from the consequences of defendant's negligence, the defendant should not be permitted to say that her act was entirely voluntary, and that the injuries she received did not follow proximately from its original wrong. * * * If it negligently set out fire which endangered property, it knew that the owner was bound to make all reasonable efforts to save himself from harm; and if, in the exercise of reasonable care in the performance of this duty, he received an injury, the original fault of the defendant is something more than a condi-

thorities are not uniform upon the question of whether the negligence which puts property in danger of destruction is the proximate cause of injuries sustained in a reasonable attempt to save the property.⁶² The negligence which puts a fellow being in peril of life or limb is usually held to be the proximate cause of injury to one who attempts, in a prudent manner, to rescue the person in danger.⁶³ These sort of cases are more frequently contested on the ground of contributory negligence and further illustrations will be found under that head.⁶⁴

If one is put in peril by the negligence of the defendant and is injured in his attempt to avoid the peril, the defendant's negligence is the proximate cause.⁶⁵ This class of cases is also usually contested on the ground of contributory negligence. Similar to these are the cases where a person is negligently put off the cars at the wrong place and suffers from exposure before shelter or destination can be reached.⁶⁶ A railroad company sent the plaintiff out on its road from St. Paul to repair a wrecked caboose, but provided no means for his return or proper accommodation. In consequence he was obliged to walk nine miles after dark in cold, inclement weather, in order to reach the nearest place for food and shelter, whereby he was made sick and rheumatic and

tion. It was, as we view it, the efficient cause of the injury. That injury may result from actual contact with the fire, or from overexertion, and either case is a proximate result." Pp. 617, 618. The same ruling is made in *Berg v. Great Northern Ry. Co.*, 70 Minn. 272, 73 N. W. 648, 68 Am. St. Rep. 524, and *Lining v. Ill. Cent. Ry. Co.*, 81 Ia. 246, 47 N. W. 66.

62—See *Chattanooga, etc., Co. v. Hodges*, 109 Tenn. 331, 70 S. W. 616, 97 Am. St. Rep. 844, 60 L. R. A. 459, and cases cited; *Seale v. Gulf, etc., Co.*, 65 Tex. 274; *Hinchey v. Manhattan Ry. Co.*, 49 N. Y. Supr. 406.

63—*Maryland Steel Co. v. Marney*, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842.

64—*Post*, Chap. XXI.

65—*Windeler v. Rush Co. Fair Ass.*, 27 Ind. App. 92, 59 N. E. 269, 60 N. E. 954; *Western Md. R. R. Co. v. State*, 95 Md. 637, 53 Atl. 969; *St. Joseph, etc., R. R. Co. v. Hodge*, 44 Neb. 448, 62 N. W. 887.

66—*Cincinnati, etc., Co. v. Eaton*, 94 Ind. 474; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346; *Brown v. Chicago, etc., Ry. Co.*, 54 Wis. 342; *Louisville, etc., R. R. Co. v. Sullivan*, 81 Ky. 624.

permanently injured. The negligence of the company in subjecting him to the exposure was the proximate cause of his injuries.⁶⁷ Where a person was wrongfully ejected from a train on a cold night and took cold and was ailing for two weeks, when he had typhoid fever and died, it was held the company was not liable for the death, in the absence of evidence to show that the fever was the result of the cold and exposure.⁶⁸ And where a passenger was negligently carried by her station and was injured by the explosion of a lamp in a hotel while waiting over night to return, there was no proximate connection between the negligence and the injury.⁶⁹ And so wrong information as to the connection of trains at a certain junction is not the proximate cause of injuries sustained by a passenger from storms and rough roads, in driving from the junction to her destination.⁷⁰

Failure to stop a street car at the proper crossing is not the proximate cause of an injury to a passenger by reason of the defective or dangerous condition of the street which she is obliged to traverse because of the mistake.⁷¹ The negligent or unlawful obstruction of a crossing by a railroad company is not the proximate cause of an injury sustained in attempting to go around the obstruction.⁷²

The negligence of a street car company in leaving a reel beside the road which is set in motion by boys is not the proximate cause of injuries to a traveler whose carriage is hit by the reel.⁷³

67—*Schumaker v. St. Paul, etc., R. R. Co.*, 45 La. Ann. 778, 13 So. 559. 866; *Haley v. St. Louis Transit Co.*, 179 Mo. 30, 77 S. W. 731, 64 L. R. A. 295.

68—*Randall v. New Orleans, etc., R. R. Co.*, 45 La. Ann. 778, 13 So. 166. 72—*Cleveland, etc., Ry. Co. v. Lindsay*, 109 Ill. App. 533; *Enochs v. Pittsburg, etc., Ry. Co.*, 145 Ind. 634, 44 N. E. 658; *Kelley v. Texas, etc., Ry. Co.*, 97 Tex. 619, 80 S. W. 1197.

69—*Central of Georgia Ry. Co. v. Price*, 106 Ga. 176, 32 S. E. 77. 73—*Glasse v. Worcester Consolidated St. Ry. Co.*, 184 Mass. 315, 68 N. E. 336. And see *McDonald v. Great Western Ry. Co.*, (1903) 2 K. B. 331, where cars were set in motion by boys.

70—*Fowlkes v. Southern Ry. Co.*, 96 Va. 742, 32 S. E. 464.

71—*Conway v. Lewiston, etc., Horse R. R. Co.*, 90 Me. 199, 38 Atl. 110; *Joslyn v. Milford, etc., St. Ry. Co.*, 184 Mass. 65, 67 N. E.

Negligence of contractors having the custody of a convict in permitting him to escape or go at large, is not the proximate cause of a rape committed by him, though the contractors know that he is vicious and prone to desire sexual intercourse.⁷⁴ Where by the negligence of a railroad company a passenger was thrown out of the rear door of a train upon the track and, while lying there insensible, was run over and killed by the locomotive of another company, which had a right to use the tracks, the negligence of the first company was held the proximate cause of death.⁷⁵ Where a ladder was placed over a sidewalk for use in painting a building and was left for thirteen days, after the job was finished, when it was blown down and injured a passer by, negligence in leaving the ladder was held the proximate cause of the injury.⁷⁶ The defendant shipped a car load of petroleum in a car which had no valve to regulate the outflow of the oil. Owing to the absence of the valve, when the consignee undertook to draw off the oil, it ran out so rapidly that it overflowed into the plaintiff's engine room beside the track, exploded and destroyed the mill. The loss was held not to be the proximate result of the defendant's negligence in regard to the valve.⁷⁷

"Where one party has been negligent, and the second party knowing of such antecedent negligence, fails to use ordinary care to prevent an injury which the antecedent negligence renders possible, and the injury follows by reason of such failure, the negligence of the second party is the sole proximate cause of the

74—*Henderson v. Dade Coal Co.*, 100 Ga. 568, 28 S. E. 251, 40 L. R. A. 95.

75—*Southern Ry. Co. v. Webb*, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109. The syllabus by the court is: "If the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could rea-

sonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the casual connection is not broken, and the original wrong-doer is responsible for all of the consequences resulting from the intervening act."

76—*Moore v. Townsend*, 76 Minn. 64, 78 N. W. 880.

77—*Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253.

injury.”⁷⁸ Some additional cases on proximate cause are referred to in the margin.⁷⁹

Accidental Injuries. For a purely accidental occurrence, *causing damage without the fault of the person to whom it is attributable, no action will lie, for though there

78—*Bostwick v. Minneapolis, etc., Ry. Co.*, 2 N. D. 440, 51 N. W. 781. To same effect: *Lloyd v. Abemarle, etc., R. R. Co.*, 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764; *Railroad Co. v. Kasen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; *Hays v. Gainesville St. Ry. Co.*, 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; *Sanches v. San Antonio, etc., Ry. Co.*, 88 Tex. 117, 30 S. W. 431; *Texas, etc., Ry. Co. v. Breadow*, 90 Tex. 26, 36 S. W. 410; *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah 281, 52 Pac. 92, 67 Am. St. Rep. 621, 40 L. R. A. 172; *Chesapeake, etc., Ry. Co. v. Rodgers*, 100 Va. 324, 41 S. E. 732; *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 886.

79—The act or negligence alleged held proximate cause. *Postal Tel. Cable Co. v. Hulsey*, 132 Ala. 444, 31 So. 527; *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; *L. Wolf Mfg. Co. v. Wilson*, 152 Ill. 9, 38 N. E. 694, 26 L. R. A. 229; *Roodhouse v. Christian*, 158 Ill. 137, 41 N. E. 748; *Davis v. Williams*, 4 Ind. App., 487, 31 N. E. 89; *West v. Ward*, 77 Ia. 323, 42 N. W. 309, 14 Am. St. Rep. 284; *Henderson v. O'Halloran*, 114 Ky. 186, 70 S. W. 662; *Ela v. Postal Tel. Cable Co.*, 71 N. H. 1, 51 Atl. 281; *Leeds v. N. Y. Telephone Co.*, 178 N. Y. 118, 70 N. E. 219; *Chambers v. Carroll*, 199 Pa. St. 371, 49 Atl. 128; *Mem-*

phis, etc., R. R. Co. v. Green, 87 Tenn. 698, 11 S. W. 931, 4 L. R. A. 858; *Washington v. Missouri, etc., Ry. Co.*, 90 Tex. 314, 38 S. W. 764; *Gilson v. Del. & H. C. Co.*, 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802; *Watts v. Southern Bell Tel. & Tel. Co.*, 100 Va. 45, 40 S. E. 107; *Jackson v. Wis. Tel. Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101; *Zopf v. Postal Tel. Cable Co.*, 60 Fed. 987, 9 C. C. A. 308.

Held not proximate cause. *East Tennessee, etc., Ry. Co. v. Reynolds*, 93 Ga. 570, 20 S. E. 70; *Louisville, etc., R. R. Co. v. Hall*, 106 Ga. 786, 32 S. E. 860; *Andrews v. Kinsel*, 114 Ga. 390, 40 S. E. 300, 88 Am. St. Rep. 25; *Stewart v. Strong*, 20 Ind. App. 44, 50 N. E. 95; *De Camp v. Sioux City*, 74 Ia. 392, 37 N. W. 971; *Consolidated Elec. L. & P. Co. v. Koepp*, 64 Kan. 735, 67 Pac. 608; *Missouri Pac. Ry. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Fales v. Cole*, 153 Mass. 322, 26 N. E. 872; *Stone v. Boston & A. R. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Chaddock v. Plummer*, 88 Mich. 225, 50 N. W. 135, 26 Am. St. Rep. 223; *Swinfin v. Lawry*, 37 Minn. 345, 34 N. W. 22; *Stagg v. Edward Weston Tea & S. Co.*, 169 Mo. 489, 69 S. W. 391; *Hollenbeck v. Johnson*, 79 Hun. 499, 29 N. Y. S. 945; *Murphy v. New York*, 89 App. Div. 93, 85 N. Y. S. 445; *Scott v. Allegheny Val. R. R. Co.*, 172 Pa. St. 646, 33 Atl. 712; *Roach v.*

is damage the thing amiss—the *injuria*—is wanting.⁸⁰ “For a mere accident, unmixed with negligence or fault on the part of the person to whom it is attributed, no action will lie. An accident, then, which furnishes no cause of action, is an inevitable occurrence, not to be foreseen and prevented by vigilance, care and attention, and not occasioned or contributed to, in any man-

- Kelly, 194 Pa. St. 24, 44 Atl. 1090, 75 Am. St. Rep. 685; Douglass v. New York Central, etc., R. R. Co., 209 Pa. St. 128, 58 Atl. 160; Patton v. Railway Co., 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184; Texas, etc., Ry. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162; Huber v. La Crosse City Ry. Co., 92 Wis. 636, 66 N. W. 708, 53 Am. St. Rep. 940, 31 L. R. A. 583; Chicago, etc., R. R. Co. v. Elliott, 55 Fed. 949, 5 C. C. A. 347; Cole v. German S. & L. Soc., 124 Fed. 113, 59 C. C. A. 593; Central of Ga. Ry. Co. v. Edwards, 111 Ga. 528, 36 S. E. 810; Marsh v. Giles, 211 Pa. St. 17.
- 80—Weaver v. Ward, Hob. 134; Gibbons v. Pepper, 1 Ld. Ray. 38; Lloyd v. Ogleby, 5 C. B. (N. S.) 667; Cotton v. Wood, 8 C. B. (N. S.) 568; Hammack v. White, 11 C. B. (N. S.) 588; Alderson v. Waistell, 1 C. & K. 357; Holmes v. Mather, L. R. 10 Exch. 261; Vincent v. Stenehour, 7 Vt. 62, 29 Am. Dec. 145; Dygert v. Bradley, 8 Wend. 469; Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Clark v. Foot, 8 Johns. 421; Sheldon v. Sherman, 42 N. Y. 484, Am. Rep. 569; Newcomb v. Van Zile, 34 Hun. 275; Wilson v. Rockland Manuf. Co., 2 Harr. 67; Spencer v. Campbell, 9 W. & S. 32; Boynton v. Rees, 9 Pick. 527; Rockwood v. Wilson, 11 Cush. 221; Brown v. Kendall, 6 Cush. 292; Gault v. Hames, 20 Md. 297; Robinson v. Grand Trunk R. Co., 32 Mich. 322; Lewis v. Flint, etc., Ry. Co., 54 Mich. 55, 52 Am. Rep. 790; Schroeder v. Mich. Car Co., 56 Mich. 132; Toledo, etc., R. R. Co. v. Daniels, 21 Ind. 162; Indianapolis, etc., R. R. Co. v. Truitt, 24 Ind. 162; P. C. & S. R. Co. v. Smith, 26 Ohio St. 124; Express Co. v. Smith, 33 Ohio St. 511; Burton v. Davis, 15 La. Ann. 448; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Hanlon v. Ingram, 3 Clark (Iowa), 81; Morris v. Platt, 32 Conn. 75; Strouse v. Whittlesey, 41 Conn. 559; Chicago, etc., R. R. Co. v. Jacobs, 63 Ill. 178; Toledo, etc., R. R. Co. v. Jones, 76 Ill. 311; Lincoln, etc., Co. v. McNally, 15 Ill. App. 181; Stearns v. Hooper, 78 Cal. 341, 20 Pac. 734; Steen v. Williamson, 92 Cal. 65, 28 Pac. 53; Jackson v. Standard Oil Co., 98 Ga. 749, 26 S. E. 60; Reid v. Ga. R. & B. Co., 81 Ga. 694, 8 S. E. 629; Kelley v. Cable Co., 8 Mont. 440, 20 Pac. 669; Hopkins v. Butte, etc., Co., 13 Mont. 223, 33 Pac. 817, 40 Am. St. Rep. 438; Allison Mfg. Co. v. McCormick, 118 Pa. St. 519, 12 Atl. 273, 4 Am. St. Rep. 613, Purdy v. Westinghouse, etc., Co., 197 Pa. St. 257, 47 Atl. 237, 80 Am. St. Rep. 816, 51 L. R. A. 881; Consumers' Brewing Co. v. Doyle, 102 Va. 399, 46 S. E. 390; Dicken v. Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582; Miller v. Casco, 116 Wis. 510, 93 N. W. 447; Hunter

ner, by the act or omission of the company, its agents, employes or servants.'⁸¹

Some illustrations are given, in all of which the loss or injury was held to be accidental. The defendant's horses ran away without his fault, and injured the plaintiff.⁸² An employe in a store, carrying a heavy roll of cloth, stumbled on a roll of matting in the passageway, fell and hit the plaintiff.⁸³ A servant in defendant's restaurant took up a burning lamp to remove it. His clothes caught fire and he threw the lamp towards the door. It exploded and injured a customer.⁸⁴ A storm on lake Pontchartrain loosened defendant's raft from its moorings, broke it up and drove the logs against the plaintiff's embankment, doing serious damage.⁸⁵ The defendant had a sign board on his land a hundred feet from the highway. The plaintiff's horse was frightened by its being blown down and she was injured.⁸⁶ The defendant's servant was using an axe on the fifth floor of a building. As he raised it to strike, the axe flew off, went through a door and hit the plaintiff on the first floor. The axe had been in use two years, had been frequently inspected and was apparently all right.⁸⁷ Oil works were on fire and the oil escaped and was conducted into a sewer under the direction of the chief of the fire department. The outlet of the sewer was obstructed by high water. Some days afterwards the oil in the sewer exploded underneath a building and killed the plaintiff's husband who worked therein.⁸⁸ An express car with others was blown from the

v. Kansas City, etc., Co., 85 Fed. 93, 37 Atl. 186, 59 Am. St. Rep. 379, 29 C. C. A. 206; *Kinsel v. Atlanta, etc., Ry. Co.*, 137 Fed. 489, 632.

85—*New Orleans, etc., R. R. Co. v. Lumber Co.*, 49 La. Ann. 1184, 22 So. 675, 38 L. R. A. 134.

86—*O'Sullivan v. Knox*, 81 App. Div. 438, 80 N. Y. S. 848.

87—*Stearns v. Ontario Spinning Co.*, 184 Pa. St. 519, 39 Atl. 292, 63 Am. St. Rep. 769, 39 L. R. A. 842.

88—*Fuchs v. St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136.

On a previous appeal the city was held liable. *Fuchs v. St. Louis*, 133

83—*Wall v. Lit*, 195 Pa. St. 375, 46 Atl. 4.

84—*Donohue v. Kelly*, 181 Pa. St.

82—*Creamer v. McIlvain*, 89 Md. 343, 43 Atl. 935, 73 Am. St. Rep. 186, 45 L. R. A. 531.

track by a high wind. The express car immediately took fire from a stove and was rapidly consumed with its contents, so that the express messenger barely escaped with his life. The loss of the express matter was held to be due to inevitable accident or the act of God.⁸⁹ Additional illustrations will be found in the margin.⁹⁰

Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118.

89—*Blythe v. Denver, etc., R. R. Co.*, 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615.

90—Damage from extraordinary floods falls under this rule. *Brown v. Susquehanna Boom Co.*, 109 Pa. St. 57, 58 Am. Rep. 708; *Thatcher v. Baker*, 15 id. 22. See *Viterbo v. Friedlander*, 120 U. S., 707; *Grand Valley R. R. Co. v. Pitzer*, 14 Colo. App. 123, 59 Pac. 420; *Am. Brewing Ass. v. Talbot*, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538.

Encamping and hunting in a wilderness district is not such an illegal and mischevious act as will render the person responsible for all injury that may result to others regardless of diligence, care, or prudence on his part. *Bizzell v. Booker*, 16 Ark. 308. Where a party, in self-defense, fired a pistol at his assailant and accidentally shot a third party, he was held not liable for the injury done. *Morris v. Platt*, 32 Conn. 75. See, to the same effect, *Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615. Where in the use of a steam engine without negligence it explodes and causes injury to others, the owner is not liable therefor. *Losee v. Buchanan*, 51 N. Y. 746, 10 Am. Rep. 623; *Marshall v. Welwood*, 38 N. J. 339, 20 Am. Rep. 394. So as to accidents from machinery, where their liability to happen is

proved only by their actual happening. *Richards v. Rough*, 53 Mich. 212; *Sjogren v. Hall*, Id. 274. So as to injuries from the use of dye-stuff supposed harmless. *Gould v. Slater Woolen Co.*, 147 Mass. 315, 17 N. E. 531. A mule caught its foot in a hole in a railroad track so small that no one could have foreseen such result. *Held*, no liability. *Nelson v. Chicago, etc., Ry. Co.*, 30 Minn. 74. So where a workman was painting by lamplight the inside of a tank with an approved and long used paint, bought ready for use, and the benzine in the paint caused an explosion. *Allison Mfg. Co. v. McCormick*, 118 Pa. St. 519, 12 Atl. 273. So where the plaintiff was painting a hot boiler with coal tar and the tar popped and put out his eye. This was the material ordinarily used for the purpose and no such accident had been known to happen before. *San Antonio Gas Co. v. Robertson*, 93 Tex. 503, 56 S. W. 323. From some unexplained cause a telegraph wire across a track sagged, and hitting a brakeman on top of a car broke, at the same time becoming fastened to the car brake. The end caught a man engaged in business near the depot, and the wire being drawn along by the moving train the man was killed. *Held*, to be an accident. "Negligence," says MITCHELL, C. J., "is

[*93] *Damage from the Lawful Exercise of Rights. It is *damnum absque injuria* also if through the lawful and proper exercise by one man of his own rights a damage results to another, even though he might have anticipated the result and avoided it. That which it is right and lawful for one man to do cannot furnish the foundation for an action in favor of

[*94] another.⁹¹ *Nor can the absence of commendable motive on the part of the party exercising his rights be the legal substitute or equivalent for the thing amiss which is one of the neces-

not to be presumed upon the fact of an occurrence like that involved in the present case, the statement of which suggests its anomalous, exceptional and extraordinary character." *Wabash, etc., Ry. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391. An accident may be defined as an event happening unexpectedly and without fault: if there is any fault there is liability. As where one drives against another by getting on the wrong side of the road in a dark night. *Leame v. Bray*, 3 East. 593. Or by pulling the wrong rein by mistake. *Wakeman v. Robinson*, 1 Bing. 213. See *Shawhan v. Clarke*, 24 La. Ann. 390; *W. U. Tel. Co. v. Quinn*, 56 Ill. 319; *Sullivan v. Scripture*, 3 Allen. 564.

91—*Aldred's Case*, 9 Co. 58, b.; *Acton v. Blundell*, 12 M. & W. 350; *Chasemore v. Richards*, 2 H. & N. 168; S. C. 7 H. L. Cas. 749; *New River Co. v. Johnson*, 2 El. & El. 435; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; S. C. in Error, 11 Pet. 420; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Chatfield v. Wilson*, 28 Vt. 49; *Frazier v. Brown*, 12 Ohio St. 294; *Wheatley v. Baugh*, 25 Penn. St. 528, 44 Am. Dec. 721; *Hitchcock v. Bacon*, 118 Pa. St. 272, 12

Atl. 352; *Fisher v. Seaboard Air Line Co.*, 102 Va. 363, 46 S. E. 381; *Russell v. Bancroft*, 79 Tex. 377, 15 S. W. 282.

The rule applies to the case of a landlord, where his tenant's employer has made it a condition of employment that he shall not live in the landlord's house. *Heywood v. Tillson*, 75 Me. 225. So as to the use of streams and water. *De Baun v. Bean*, 29 Hun, 236; *Bullard v. Victory Mfg. Co.*, 77 N. Y. 525; *Hoxsie v. Hoxsie*, 38 Mich. 77; *Railroad Co. v. Carr*, 38 Ohio St. 448, 43 Am. Rep. 428; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569. A man bought land with special reference to a brook of pure water running through it. Afterward a coal mine was opened higher up the stream which afforded the natural drainage for the locality. The water pumped from the mine ran into the stream and polluted it. The Court first held the pollution actionable, *Sanderson v. Penn. Coal Co.*, 86 Pa. St., 401, 27 Am. Rep. 711, but afterwards decided it to be *damnum absque injuria*. *Penn. Coal Co. v. Sanderson*, 113 Pa. St. 126.

The exercise of the right to abandon his mine by one of two adjoining mine owners does not

sary elements of a wrong. "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."⁹² This question has frequently arisen where a person has maliciously erected a fence on his own land for the purpose of cutting off the light and prospect from his neighbor. It is generally held that there is no common law remedy in such cases, that what a man may lawfully do on his own land he may do regardless of his motive.⁹³ In Michigan such a fence, which

give the other a right of action if by reason of such abandonment water, which otherwise would have been pumped out, accumulates and flows into the worked mine. *Nat. Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83; *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 533. So, if by working out, the surface sinks and rain, which had before flowed off, falls into the old workings and percolates into an adjoining mine. *Wilson v. Waddell*, L. R. 2 App. Cas. 95; *Lord v. Carbon Iron Co.*, 42 N. J. Eq. 157. So where land between plaintiff's and defendant's had been worked out and by defendant's excavating his, such intervening land fell and caused plaintiff's to subside. *Birmingham v. Allen*, L. R., 6 Ch. D. 284.

From a lawful use of a street, no action arises. *Grand Rapids, etc., R. R. Co. v. Heisel*, 38 Mich. 62; *Grand Rapids St. Ry. Case*, 48 Mich. 433; see *Garrett v. Janes*, 65 Md. 260. So as to obstruction of navigation in rebuilding a lawful bridge. *Hamilton v. Vicksburg, etc., R. R. Co.*, 119 U. S. 280; see *Abbott v. Kansas, etc., Ry. Co.*, 83 Mo. 271. Otherwise if the act is not necessary to the public improvement, authorized by law, in the course of which it is done.

Hackstack v. Keshena Impr. Co., 66 Wis. 439. Inconvenience suffered in obeying police regulation of the State is wrong without injury. *Flint, etc., Ry. Co. v. Detroit, etc., R. R. Co.*, 64 Mich. 248, 31 N. W. 281.

But if by the careful washing of an upper floor, water is made to run into the room below, the upper tenant is liable, provided the lower tenant is not chargeable with the duty of repairing the floor. *Patton v. McCants*, 29 S. C. 597, 6 S. E. 849

92—*Parke, B., in Stevenson v. Newnham*, 13 C. B. 285. Quoted and applied in *Boysen v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233. See *Floyd v. Baker*, 12 Co. 23; *Stowball v. Ansell*, Comb. 11; *Taylor v. Henniker*, 12 Ad. & El. 488; *Phelps v. Nowlen*, 72 N. Y. 39; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543. For further discussion of this subject see Chapters IX and XXII; *Allen v. Flood*, (1898) A. C. 1; *Ajello v. Worsley*, (1898) 1 Ch. 274.

93—*Lord v. Langdon*, 91 Me. 221, 39 Atl. 552; *Horan v. Byrnes*, 70 N. H. 531, 49 Atl. 569; *Levy v. Brothers*, 4 Misc. 48, 23 N. Y. S. 825; *Metzger v. Hochrein*, 107 Wis. 267, 83 N. W. 308, 81 Am. St. Rep. 841, 50 L. R. A. 305.

serves no useful purpose and is erected out of spite, will be enjoined as a nuisance.⁹⁴ But in the same state it is not actionable to maliciously locate a coal and wood house so as to cut off the plaintiff's light and the principle of the former cases is confined to erections which serve no useful purpose and are purely malicious.⁹⁵ In some states an action is given in such cases by statute.⁹⁶

The question whether acts, otherwise lawful, may be actionable by reason of the motive with which they are done, has been much discussed in recent cases involving the rights of trade and labor.⁹⁷ In a recent case of this sort the supreme court of Massachusetts says: "It is said also that where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. * * * If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either legally or logically sound. * * * In so far as a right is lawful, it is lawful, and in many cases the right is so far absolute as to be lawful whatever be the motive of the action, as where one digs upon his own land for water, or makes a written lease of his land for the purpose of terminating a tenancy at will, but in many cases the lawfulness of an act

94—*Burke v. Smith*, 69 Mich. 380, 37 N. W. 838; *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381, 21 Am. St. Rep. 510, 8 L. R. A. 183; *Kirkwood v. Finnegan*, 95 Mich. 543, 55 N. W. 457; *Peek v. Roe*, 110 Mich. 52, 67 N. W. 1080. And see *Kessler v. Lett*, 7 Ohio C. C. 108.

95—*Kuzniak v. Kozminski*, 107

Mich. 444, 65 N. W. 275, 61 Am. St. Rep. 344.

96—*Whitlock v. Uhle*, 75 Conn. 423, 53 Atl. 891; *Lord v. Langdon*, 91 Me. 221, 39 Atl. 552; *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 12 Am. St. Rep. 560, 2 L. R. A. 81; *Smith v. Morse*, 148 Mass. 407, 19 N. E. 393; *Brostrom v. Lauppe*, 179 Mass. 315, 60 N. E. 785.

97—See Chapter IX.

which causes damage to another may depend upon whether the act is for justifiable cause; and this justification may be found sometimes in the circumstances under which it is done irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined."⁹⁸

Crimes and Torts Distinguished. It was observed in a previous chapter that the same act may constitute a public offense and also a private injury; or, in other words, may be both a crime and a tort. But whether or not it shall have this two-fold character can never be determined by an analysis of the moral qualities, and a determination of the presence or absence of evil intent. We must look beyond these, and see whether the act comes within the definition of a crime, and also within that of a private injury, and if it does, the fact that it is the one will not prevent its being the other also. Certain acts or omissions are made public offenses by the common law or by statute, either because their inherent qualities and necessary tendencies make them prejudicial to organized society, or because it is believed that the evils likely to flow from them will be so serious that the general good will be subserved by forbidding them; and penalties are attached to them, which are imposed on public grounds. These according to their grade, are crimes or misdemeanors, or they are simply things prohibited under penalty. But where the same wrongful acts cause damage to private individuals, they come directly within the definition of *torts, and are such. If one man [*95] strikes another in anger, the public peace is broken, and the man assaulted is injured; and there is thus a public wrong and a private wrong. Punishing one does not redress the other, nor does forgiving the one preclude legal proceedings to punish or obtain compensation for the other.

98—*Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339. In *Hollenbeck v. Ristine*, 105 Ia. 488, 75 N. W. 355, 67 Am. St. Rep. 306, the court says: "If one intentionally causes temporal loss and damage to another without justifiable cause and with malicious purpose to inflict it, that other may recover, in an action of tort, the damages he has sustained as a natural and proximate result of the wrong." S. C. 114 Ia. 358, 86 N. W. 377. See also *Hollenbeck v. Hall*, 103 Ia. 214.

Many attempts have been made to draw a clear distinction between a tort and a crime, but they have not always thrown light upon the subject. Thus Blackstone says: "The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: That private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity. As if I detain a field from a man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land; but treason, murder and robbery are properly ranked among crimes; since, beside the injury done to individuals, they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity.⁹⁹ Again, it is said by Lord MANSFIELD: "The offense that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or many of his customers, or uses them in the general course of his dealings. So, if a man defrauds another under false tokens; for these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat; for ordinary care and caution is no guard against this."¹ And still another judge has said: "All offenses of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable."²

Now it is not an immaterial matter to the public that one man takes from another his land, whether it be done by force or [*96] by stealth; and if it were so, the law might well *have made no provision on the subject. Among the highest purposes of government are the protection of property and the

99—4 Bl. Com. 5.

2—LAWRENCE, J., in *King v. Hig-*

1—*Rex v. Wheatly, Burr. 1125, gins, 2 East, 5, 20.*

1127.

enforcement of justice in respect thereto, as between those who may be adverse claimants; and for these purposes courts and offices are created and are supported at large expense to the State. Nor can the tendency of any particular act or omission, or the practicability of guarding and protecting against it be the sole and sufficient test of crime and tort; for many things are crimes which due caution might guard against and many things are only torts which are done secretly, and which the prudence of the injured party cannot prevent. Mr. Austin more correctly says: "The difference between crimes and civil injuries is not to be sought in a supposed difference between their tendencies, but in the difference between the mode wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party or his representative is a civil injury. An offense which is pursued by the sovereign or by the subordinate of the sovereign, is a crime."³ This more correctly states the real distinction, which after all must be found in positive laws.⁴

In those cases in which wrongs to individuals are regarded as wrongs to the State also, they are so regarded *either[*97] because the common law, in consideration of their evil effects upon the social state, or their tendency to disturb it, has

3—Austin, Jurisprudence Lec. XVII.

4—"It is plain, as matter of philosophical speculation, that any act which injures any member of the body politic injures the body politic. The inference from this proposition would be, that every such act, falling directly though it may, only on an individual, is of a nature to be indictable. But this philosophical view is limited in its practical application by the doctrine that the law does not take cognizance of small things. If an injury is of a private nature, affecting directly and primarily only a single person, though the injury

is great in magnitude, it still, as a general proposition, is deemed a small thing in the law, when viewed with reference to the public. The individual injured has, in such a case, his civil remedy, but an indictment will not lie. * * A better practical statement of the doctrine, therefore, is, that either the act must be in its nature injurious to the public at large, in distinction from individuals, or else it must be a wrong to individuals of a nature which the public takes notice of as done to itself. The books are full of expressions going further than this statement, to the effect that

declared them such, or because the statute law, on similar considerations, has made them punishable on a public prosecution. Other wrongs are regarded by the law as private wrongs, merely because it is believed that sufficient protection is given when a remedy is provided which the party wronged can pursue at his option. If he pursues this remedy and obtains redress, any incidental injury the public may have suffered from the act or omission constituting the wrong is supposed to be too insignificant to demand the attention of the State; if he overlooks or forgives the wrong, no one else is supposed sufficiently concerned to warrant an interference.

The foregoing constitutes the only reliable distinction between a crime and a tort; but some of their respective characteristics may be mentioned. In a crime, the most conspicuous and inseparable element is the intent; in a tort, on the other hand, the intent is usually of subordinate importance; sometimes of no importance whatever. The State will not punish an act as a crime unless there is an evil intent either actually indulged or imputable. Where there has been no purpose to disobey the public laws, there cannot, in general, be a crime. A murder lies not in the killing, but in accomplishing a murderous purpose. If one knocks another down purposely, it is a crime; but if carelessly, it is only a tort. If one negligently burn his neighbor's house, it is no arson, but it is a tort, because the neighbor had a right to enjoy his house in peace, and to have others observe toward him due care in any action that might endanger his

in all cases the act must be a public wrong, in distinction from a private. But clearly such expressions arise from misapprehension; for, to illustrate, nothing can be more purely and exclusively a tort against the individual alone than a simple larceny, where there is no breach of the peace, no public loss of property, since it only changes hands; no open immorality, corrupting the minds of the young; no person in any way

affected but he who takes and he who loses the thing stolen; and, as in larceny, so in many other crimes. * * Whenever the public deems that an act of wrong to individuals is of such a nature as to require the public protection to be cast over the individual, with respect to the act, it makes the act punishable at the suit of the public; or, in other words, it makes it a crime." 1 Bishop, Cr. Law, §§ 532, 533, 3d ed.

property. But there may be a negligence so gross as to be criminal; the criminal inattention to the rights and safety of others, supplying the place of intent. Such would be the case if the keeper of a savage beast were to leave it to wander at large, or if one on the roof of his dwelling were to throw the snow and ice into the public street without looking to *ascertain if persons were passing; or if a sportsman were to fire in [*98] the direction and within the reach of a crowd of people; or if the conductor of a railway train were to run out of time in disregard of orders. In the case of negligence so gross, the law implies a guilty intent; or, in other words, it implies that the culpable party must have intended the natural and probable consequences of that which he did or neglected to do, and it holds him accountable accordingly.⁵

A classification of the various cases of injuries not actually intended may assist in determining the criminal or civil responsibility. The following will, perhaps, be sufficient:

1. Those where an individual, in the exercise of his rights, has accidentally, but without negligence, caused damage to another; as where the horse he was driving has taken fright and run his vehicle against the other's vehicle or person. In such a case he is not legally responsible, either civilly or criminally. No one is in fault; the injury is to be attributed to inevitable accident, and the damage must be left where it chanced to fall.

5—*James v. Campbell*, 5 C. & P. 372; *Regina v. Towers*, 12 Cox C. C. 530; *Regina v. Macleod*, Id. 534; *Regina v. Finney*, Id. 625; *Regina v. Jones*, Id. 628; *People v. Fuller*, 2 Park. C. R. 16; *Rice v. State*, 8 Mo. 561; *State v. Vance*, 17 Iowa, 138; *Lee v. State*, 1 Cold. 62; *Sparks v. Commonwealth*, 3 Bush, 111; *Chrystal v. Commonwealth*, 9 Bush, 669; *State v. Center*, 35 Vt. 378; *U. S. v. Keller*, 19 Fed. Rep. 633; *State v. Justus*, 11 Ore. 178, 50 Am. Dec. 470; as to responsibility for death from careless handling of loaded pistol; *State v. Emery*, 78 Mo. 77, 47 Am. Rep. 92; *State v. Hardie*, 47 Ia. 647; *Robertson v. State*, 2 Lea, 239, 31 Am. Rep. 602. With no evil intent and with the patient's consent, a physician applied kerosene in such a way as to produce death. Held guilty of manslaughter on the ground that he had been guilty of gross and reckless negligence. *Com. v. Pierce*, 138 Mass. 165, 52 Am. Rep. 264.

2. Those where a man, in exercising his rights, has been guilty of negligence to the injury of another. In these cases there is wrong in the negligence, and there is consequently that conjunction of wrong and damage which constitutes a tort.

3. Those where a party who causes the injury was at the time acting recklessly, or with such gross negligence that an injury has followed which should have been anticipated by him. These may be both crimes and torts. A killing by such recklessness or gross negligence would be punished as criminal manslaughter. A case of fatal wounds inflicted while indulging in rude and dangerous sports might be one of this description.⁶

[*99] *4. Those where a party, though not intending the particular injury, was, nevertheless, engaged in doing that which was unlawful. Here it is proper that he be held to an accountability beyond that which he is under when lawfully doing what he has a right to do. These, also may be both public and private wrongs. The case of one who, while committing a trespass, accidentally kills the person trespassed upon, is an illustration. What is thus unintentionally done in the course of a trespass is and must be blamable. The killing, though by accident, is manslaughter.⁷

The foregoing will sufficiently indicate the grounds on which the criminal law punishes evil intent, and also recklessness. The law so far makes allowances for the infirmities of our nature as

6—*Pennsylvania v. Lewis*, Add. (Pa.) 279; as to death from boxing with soft gloves. *Reg. v. Young*, 10 Cox Cr. C. 371.

7—*State v. Center*, 35 Vt. 378; *Rice v. State*, 8 Mo. 561. Where a man causes the death of his insane wife by negligently exposing her to the weather insufficiently clad, a criminal intent need not be averred, nor proved, in order to constitute manslaughter. A naked, negligent omission of a known duty, when it causes or hastens the death of a human being, con-

stitutes manslaughter. *State v. Smith*, 65 Me. 257.

Where one wrongfully took a box from a refreshment stand, on a pier, and wantonly threw it into the sea and killed a person swimming below, it was held that whether or not the act was manslaughter, depended on the question of the man's negligence, not on the fact that a civil wrong had been done in taking up and throwing away the box. *Reg. v. Franklin*, 15 Cox Cr. C. 163; S. C. 5 Am. Crim. Rep. 377.

not to punish a mere failure to observe ordinary care as a crime, though injury result; but it may justly and properly compel restitution by the party in fault to the party injured.⁸

*There is in England a rule regarding the order of proceedings when an action is both a public and private offense. The rule is, that if the public offense is of the grade of felony, the private remedy is suspended until the public justice is satisfied. Sometimes it is said that the private wrong is merged in the public wrong; but this is inaccurate; it is not merged or swallowed up, it is only stayed for the time. The rule is stated by LORD ELLENBOROUGH as follows: "The law requires that before the party injured by any felonious

8—In the private suit, a conviction in the public prosecution cannot be proved for the purpose of making out a cause of action. *Smith v. Rummens*, 1 Camp. 9. It has been held, however, that if the defendant plead guilty in the criminal suit, this is evidence against him in the civil suit. *Eno v. Brown*, 1 Root, 528. Mr. Phillips says it is *conclusive* against him. 3 Phil. Ev. 518. But in another place he speaks with more reserve. 2 Phil. Ev. 54. Mr. Starkie says the conviction on a plea of guilty is evidence, *like any other admission*. 2 Stark. Ev. 218, note. And see, *Stephens v. Jack*, 3 Yerg. 403, 24 Am. Dec. 583; *Ward v. Green*, 11 Conn. 455; *Bradley v. Bradley*, 2 Fairf. 367; *Mead v. Boston*, 3 Cush. 404. If the guilty party has been convicted, on trial, and punished for the crime, he may, nevertheless, contest the fact of guilt in a civil suit instituted by the aggrieved party, and the judgment in the criminal suit is not admissible in evidence to establish it. The reason given in some cases is, that

the plaintiff in the civil suit may have been a witness, by means of whose testimony a conviction was had, and to receive the conviction in evidence in his behalf would be to enable him indirectly to prove his case by his own oath; but the better ground is, that the parties to the two proceedings are not the same, and there is consequently a want of mutuality. *Duchess of Kingston's Case*, 20 How. St. Trials, 538; *Gibson v. McCarthy*, Ca. Temp. Hard. 311. See *England v. Bourke*, 3 Esp. 80; *Cook v. Field*, Ib. 133; *The King v. Boston*, 4 East. 572; *Burdon v. Browning*, 1 Taunt. 519; *Jones v. White*, 1 Str. 68; *Maybee v. Avery*, 18 Johns. 352; *Mead v. Boston*, 3 Cush. 404; 1 Hale P. C. 410; 1 Stark. Ev. 332; 1 Greenl. Ev. § 587 and note; 1 Phil. Ev., Ch. 4, § 2; 2 Ibid. Ch. 1, § 1.

Because the facts in a civil case involve a crime makes no difference in the degree or extent of proof required in the civil suit. *Heiligmann v. Rose*, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272.

act can seek civil redress for it, the matter should be disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offense; and after a verdict, either of acquittal or conviction, a civil action may be maintained."⁹

Looking for the reason of the rule, which seems a harsh one, we discover it in the fact that in that country the party injured is relied upon to take the place of public prosecutor; and [*101] his *interest in the accomplishment of public justice is enlisted and kept active by postponing the redress of his private grievance. But the reason for this suspension of private remedy failed when property which was the subject of felony had passed into the hands of innocent parties, by purchase or otherwise, and in such cases, as no prosecution of these parties was demanded at the hands of the public, the owner might proceed at once for the recovery of his property or its value.¹⁰

In this country the common law doctrine of the suspension of

9—*Crosby v. Leng*, 12 East. 409. See 1 Hale, P. C. 546; *Masters v. Miller*, 4 T. R. 320; *Higgins v. Butcher*, Yelv. 89; *Gibson v. Minet*, 1 H. Bl. 569; *Gimson v. Woodfull*, 2 C. & P. 41; *White v. Spettigue*, 13 M. & W. 603; *Stone v. Marsh*, 6 B. & C. 551. The suspension of civil remedy is frequently spoken of in the books as a *merger* of the civil action in the felony; but, as was well said by RICHARDSON, Ch. J., in *Pettengill v. Rideout*, 6 N. H. 454: "to call a suspension of civil remedy till the criminal justice of the State is satisfied a merger is, in our opinion, very little, if anything, short of an abuse of language." The suspension might take place when there was no felony at all; for if the circumstances were such that there was reasonable ground to believe the action of the party was felonious, the civil remedy was denied until

after his guilt or innocence had been determined in a criminal prosecution. *Prosser v. Rowe*, 2 C. & P. 421; *Crosby v. Leng*, 12 East, 409; *Gimson v. Woodfull*, 2 C. & P. 41. The law on this subject seems now in an unsettled state in England. In a late case where the question was fully considered upon all the cases, the court remarked that the old doctrine was exploded, but the decision turned on the fact that it did not appear whether there had been a neglect to prosecute. *Midland Ins. Co. v. Smith*, L. R. 6 Q. B. D. 561. See also *Wells v. Abrahams*, L. R. 7 Q. B. 554. *Ex parte Ball*, L. R. 10 Ch. D. 667.

10—*Marsh v. Keating*, 1 Bing. N. C. 197; *Stone v. Marsh*, 6 B. & C. 551; *White v. Spettigue*, 13 M. & W. 603; *Lee v. Bayes*, 18 C. B. 599.

civil remedy in case of felony has not been recognized. The reason usually assigned is, that in this country the duty of prosecuting for public offenses is devolved upon a public officer chosen for the purpose, instead of being left, as in England, to the voluntary action of the party injured by the crime.¹¹ The civil and the criminal prosecution may therefore go on *pari passu*, or if the latter is not commenced at all, the failure to seek public justice is no bar to the private remedy.¹²

In many cases of public wrongs the law can take no notice of private injuries as constituting the foundation of a lawful claim for compensation. Any rule that may be prescribed by the law on this subject must be a practical rule, and no rule can be practical which undertakes to give private damages in every case of a public injury. A single illustration will make this plain. Let it be supposed that a house on one of the public streets of a city is entered in the daytime and robbed, the family being first outraged or murdered. We instance such a case in order to show how a public crime of great enormity may cause injury to private interests. Every individual in the city—we might almost say in the country—is injured by the crime. His sense of security is disturbed, his enjoyment of his property is diminished, he feels the necessity of greater precautions to protect his home and family, he is more uneasy when abroad, he perhaps incurs *additional expense for locks and bolts, or he em- [*102] ploys watchmen to guard his premises day and night. Here are important elements of damage, such as the law would take notice of and give redress for if the case concerned him alone. But the case does not concern him alone; it concerns everybody; the damage which every person suffers is only a part

11—*Plummer v. Webb*, 1 Ware, 69; *Pettingill v. Rideout*, 6 N. H. 454; *Boardman v. Gore*, 15 Mass. 331; *Boston & Worcester R. R. Co. v. Dana*, 1 Gray, 83; *Hyatt v. Adams*, 16 Mich. 180; *Allison v. Bank of Va.*, 6 Rand. 204; *Ballew v. Alexander*, 6 Humph. 433; *Hepburn's Case*, 3 Bland, 114; *Foster v. Commonwealth*, 8 W. & S. 77; *Blassingame v. Graves*, 6 B. Mon. 38. But see *Sawtell v. West R. R. Co.*, 61 Ga. 567.

12—*Williams v. Dickenson*, 28 Fla. 90, 9 So. 847; *Powell v. Augusta, etc., R. R. Co.*, 77 Ga. 192, 3 S. E. 757; *Parker v. Lanier*, 82 Ga. 216, 8 S. E. 57.

of the general injury to the whole public; to redress it in private suits would require an apportionment of the general injury. But the apportionment would not only be an impracticable thing in itself, from the impossibility of ascertaining in what degree each had suffered injury, but the attempt itself, and the infinity of suits which would be requisite in the case of a single crime, would make such serious demands upon the judicial machinery of the State as could not by any possibility be met. Nothing more need be said to show that the law cannot recognize a public injury as a ground for private action.¹³

There may, nevertheless, be a special and particular injury to an individual in any case of a public injury; special in that the public do not share it at all. In the case supposed, the individual robbed has suffered special damage, and for this damage the law permits a private action. It is no answer to such an action that the general public, whose houses were not broken into, have suffered in other ways. Again: a wrong may be committed by forcibly driving an elector from the polls. The general public is injured, because the complete expression of the public sentiment in the manner provided by law, has been defeated. But the elector himself has suffered a special and particular injury in being deprived of his vote; he has lost a right which he is supposed to value highly, and he shall therefore have his action. No special embarrassment is encountered in giving a remedy to him for his peculiar injury.

Nor is it any objection to private actions that several may suffer special injuries from the same public offense. "If many persons receive a private injury from a public nuisance, every man shall have his action;"¹⁴ the test in each case being, not the number injured, but the special and personal character of the injury. A person may dam a navigable stream so as to ruin [*103] it as a highway, and in so doing may injure the several millers who were accustomed to make use of its water for

13—Bishop Cr. Law, Sec. 534, Williams' Case, 5 Rep. 72; Co. Litt. 3d ed.; 1 Bl. Com. 219. 56 a; Corley v. Lancaster, 81 Ky.

14—Per Holt, Ch. J., in Ashby v. White, Ld. Raym. 938, citing Wil-

operating their machinery. However numerous these millers may be, they do not in the aggregate constitute the public; and, in a legal sense, neither the public nor any other individual is concerned with the special damage which each of their number sustains.¹⁵

If we could imagine a state of things in which a people, without any antecedent experience in government, were proceeding to frame a code of laws, we might suppose the question worthy of consideration, whether the government should not, when its laws were violated to the injury of one of its subjects, proceed, of its own motion, to compel the proper redress; especially when compelling redress would have for one of its purposes the prevention of disorder and wrong in the future. But the answer to such a question must be, that to leave to the government the detection and punishment of those who violate private rights would be to require of it an omnipresence and a minute supervision of private affairs which would render it intolerable. The best government is that which, in its structure and machinery, affords least occasion for official interference. If the institution of proceedings for the redress of private wrongs is left to the parties injured, it may fairly be assumed that all cases will be brought to notice which the general interest requires shall be dealt with. It may also be assumed that many wrongs which are wrongs not of deliberate purpose and not serious, will be overlooked, though an officious government might be disposed to add to the disturbance they have caused by making them the subject of investigation. Good order is often as much promoted by overlooking insignificant breaches of order as by punishing them; and while justice demands that all parties be at liberty to have their complaints heard, good policy also requires that the option should be left to parties injured to waive redress if they see fit to do so.

Contracts and Torts. Passing now from a consideration of torts as they are found to be akin to or coincident with public

15—*Henley v. Lyme Regis*, 5 *McKinnon v. Penson*, 8 Exch. 319; Bing. 91; S. C. 3 B. & Ad. 77; *King v. Richards*, 8 T. R. 634. *Nicholl v. Allen*, 1 B. & S. 936;

wrongs, we may briefly direct attention to another side, [*104] on which *they seem to be mere breaches of contract. Indeed, in many cases an action as for a tort or an action as for a breach of contract may be brought by the same party on the same state of facts.^{15a} This, at first blush, may seem in contradiction to the definition of a tort, as a wrong unconnected with contract; but the principles which sustain such actions will enable us to solve the seeming difficulty.¹⁶

[*105] *If one by means of a false warranty is enabled to accomplish a sale of property, the purchaser may have his remedy upon the contract of warranty, or he may bring suit for

15a—*Church v. Anti-Kalsomine Co.*, 118 Mich. 219, 76 N. W. 383.

16—"Ordinarily the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. Where such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still, a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test.

* * * * *

"At the foundation of every tort must lie some violation of a legal duty, and, therefore, some unlaw-

ful act or omission (*Cooley on Torts*, 60). Whatever, or however numerous or formidable, may be the allegations of conspiracy, of malice, of oppression, of vindictive purpose, they are of no avail; they merely heap up epithets, unless the purpose intended, or the means by which it was accomplished are shown to be unlawful. (*O'Callaghan v. Cronan*, 121 Mass. 114; *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461.) Unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty born of the relation established to do the same thing. In such a case and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that upon a breach of the contract there is not merely a

the tort.¹⁷ The tort consists in his having been, by fraud and falsehood, induced to make the purchase. There is a broken contract, but there is also something more: there is deception to the injury of the purchaser in procuring the contract to be made. Suit may be brought on the contract, ignoring the fraud; but it may also be brought for the fraud, and then the contract will not be counted on, though it will necessarily be shown, in order to make it appear how the deception was injurious. The tort in such a case is connected with the contract only as it enabled the tort

broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused; there is constructive fraud, or a negligence that operates as such, and it is that fraud and that negligence, which, at bottom, makes the breach of contract actionable as a tort. (*Coggs v. Bernard*, 2 Lord Raym. 909; *Orange Bank v. Brown*, 3 Wend. 161.) It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty, which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every

person so to conduct himself or exercise his own rights as not to injure another. (*Kerwhacker v. C. C., etc., R. R. Co.*, 5 Ohio St. 188.) Whatever the origin, such legal duty is uniformly recognized and has been constantly applied as the foundation of actions for wrong; and it rests upon and grows out of the relations which men bear to each other in the frame-work of organized society. It is then doubtless true, that a mere contract obligation may establish no relation out of which a separate and specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort grow out of the entire range of facts of which the breach of the contract was but one." FINCH, J., in *Rich v. New York, etc., Co.*, 87 N. Y. 382.

17—*Langridge v. Levy*, 2 M. & W. 519; *Dobell v. Stevens*, 5 D. & Ry. 490; *West v. Emery*, 17 Vt. 583, 44 Am. Dec. 356; *Ives v. Carter*, 24 Conn. 392; *Johnson v. McDaniel*, 15 Ark. 109; *Newell v. Horn*, 45 N. H. 421; *Carter v. Glass*, 44 Mich. 154, 38 Am. Rep.

feasor to bring the party wronged into it.¹⁸ For malpractice by a physician either contract or tort will lie.^{18a} Where the defendant received property of the plaintiff under a contract to sell the same and turn over the total proceeds to the plaintiff, and he sold the property and converted the proceeds to his own use, it was held that either assumpsit or trover would lie.^{18b} In another case, the plaintiffs had a contract with the defendants by which the latter gave the former the exclusive right to sell certain machines invented by the defendants, who were to manufacture the machines and fix the price of sale. The plaintiffs were to have forty per centum for making the sales and, if the defendants failed to supply enough machines to meet the demand, the plaintiffs had the right to procure their manufacture elsewhere. The defendants, claiming a violation of the contract, seized the plaintiffs property, books and papers, excluded them from their place of business, advertised that they had succeeded to the business and that plaintiffs were insolvent and thereby broke up the plaintiffs business and deprived them of the benefits of the contract. It was held that though there was a breach of contract and various distinct wrongs, such as trespass, slander, etc., the plaintiffs might set forth all the facts in a single action of tort and recover the entire damage sustained.^{18c}

240; *Perdue v. Harwell*, 80 Ga. 150, 4 S. E. 877.

18—In *Dean v. McLean*, 48 Vt. 412, 21 Am. Rep. 130, it was decided that one who had contracted for running his logs over a dam, and agreed to pay all damages, might be sued in case for a negligent injury which was within the contract. The court relies upon cases where, though there is a contract against waste, an action on the case for waste is nevertheless sustained. *Kinlyside v. Thornton*, 2 Bl. R. 1111, and upon the familiar case of common carriers, alluded to in the next paragraph of the text. When the gist of the

action is the breach of a contract which must be proved to make a case, all persons jointly liable on the contract must be sued in tort. *Whittaker v. Collins*, 34 Minn. 299, 57 Am. Rep. 55.

18a—*Lane v. Borcourt*, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442.

18b—*Raub v. Stevens*, 21 Ind. App. 650, 52 N. E. 997. But where the defendant made collections for the plaintiff and refused to pay over, it was held that only assumpsit would lie. *Royce v. Oakes*, 20 R. I. 418, 39 Atl. 758; *Riley v. La Rue*, 24 R. I. 425, 39 Atl. 753.

18c—*Oliver v. Perkins*, 92 Mich.

There are also, in certain relations, duties imposed by law, a failure to perform which is regarded as a tort, though the *relations themselves may be formed by contract cover- [*106] ing the same ground. The case of the common carrier furnishes us with a conspicuous illustration. The law requires him to carry with impartiality and safety for those who offer. If he fails to do so, he is chargeable with a tort. But when goods are delivered to him for carriage, there is also a contract, express or by operation of law, that he will carry with impartiality and safety; and if he fails in this there is a breach of contract. Thus for the breach of the general duty, imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought.^{18d} So in case of telegraph companies. For negligence in sending a message either contract or tort will lie.^{18e} Other bailees of property occupy a similar position;^{18f} they assume certain duties in respect to the property by receiving it. The keeper of an inn does this in respect to property confided to his care by his guests, and his failure to perform the duty of an innkeeper is tortious, though in contemplation of law there are between him and his guest contract relations also.¹⁹ But these are exceptional cases.

304, 52 N. W. 609. For a somewhat similar case see *Shirley v. Waco Tap Ry. Co.*, 78 Tex. 131, 10 S. W. 543.

18d—*Holland v. Southern Express Co.*, 114 Ala. 128, 21 So. 992; *Louisville, etc., R. R. Co. v. Hine*, 121 Ala. 234, 25 So. 857; *Southern Ry. Co. v. Resenberg*, 129 Ala. 287, 30 So. 32.

18e—*Western Union Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 So. 607.

18f—Where the defendant let the plaintiff an unsafe carriage it was held suit might be brought on the implied warranty or in case for negligence. *Bridges v. Bridges*, 93 Me. 557, 45 Atl. 827.

19—The rule is stated by JERVIS, Ch. J., as follows: "Where there is an employment, which employment itself creates a duty, an action on the case will be for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment, by the party upon whom the duty is cast." *Courtenay v. Earle*, 10 C. B. 83. And, see, *Govett v. Radinge*, 3 East, 67. *Morgan v. Ravey*, 6 H. & N. 265.

A passenger negligently injured may sue in contract or in tort. *Baltimore, etc., Ry. Co. v. Kemp*, 61 Md. 619; *Nevin v. Pullman, etc., Co.*, 106 Ill. 222, 46 Am. Rep. 688.

The rule is general that where contract relations exist the parties assume toward each other no duties whatever besides those the contract imposes.²⁰

[*107] ***Waiving a Tort.** There are a few cases in which a party is permitted to treat that which is purely a tort as having created a contract between himself and the wrong doer, and waiving his right of action for the tort, to pursue his remedy for the breach of the supposed contract. These cases are not numerous.

It is said by an eminent judge in one case that "no party is bound to sue in tort where, by converting the action into an action on contract, he does not prejudice the defendant; and, generally speaking, it is more favorable to the defendant that he should be sued in contract, because that form of action lets in a set-off and enables him to pay money into court."²¹ This, however, is stating the rule much too broadly, for in most cases the tortfeasor could not be prejudiced by converting the action into one on contract if the law would suffer it.

The right to waive a tort and sue in assumpsit seems to have been first distinctly recognized in an action²² where assumpsit

A child traveling with its mother and an officer, carried at expense of government, may recover in tort for the carrier's negligence, though the contract of carriage is not with them. *Austin v. Grt. W. Ry. Co.*, L. R. 2 Q. B. 442; *Martin v. Grt. Ind. Ry. Co.*, L. R. 3 Exch. 9. So a father may recover for injury to his son, or a master for injury to his apprentice, though the contract is not with the father or master. *Berringer v. Grt. East Ry. Co.*, L. R. 4 C. P. D., 163, distinguishing *Alton v. Ry. Co.*, 19 C. B. (N. S.) 213; *Ames v. Un. Ry. Co.*, 117 Mass. 541, 19 Am. Rep. 426. See *Foulkes v. Metr. Dist. Ry. Co.*, L. R. 4 C. P. D., 167, S. C. 5 C. P. D. 157, as to recovery

where contract was made with another connecting company. See also *Pontifex v. Midland Ry. Co.*, L. R. 3 Q. B. D., 23; *Fleming v. Manchester, etc., Ry. Co.*, L. R. 4 Q. B. D., 81.

20—See *Quay v. Lucas* 25 Mo. App. 4; *McGuire v. Kiveland*, 56 Vt. 62. But if in addition to an indebtedness an element of wrong arises to warrant it, the creditor may sue in tort. *Monroe v. Whipple*, 56 Mich. 516. This was trover for failure to turn over money collected by a township treasurer.

21—TINDALL, Ch. J., in *Young v. Marshall*, 8 Bing. 43.

22—*Lamine v. Bonell*, Ld. Raym. 1216.

was brought by an administrator to recover the moneys received by the defendant on a sale made by him, without authority, of debentures belonging to the estate. It was objected that the action would not lie, because the defendant sold the debentures under a claim of administration in himself, and therefore could not be said to receive that money to the use of the plaintiff, which, indeed, he had received to his own use; but the plaintiff ought to have brought trover or detinue for the indentures. POWELL, J., said: "It is clear the plaintiff might have maintained detinue or trover for the indentures, but the plaintiff may dispense with the wrong and suppose the sale made by his consent, and bring an action for the money that they were sold for as money received to his use." And HOLT, Ch. J., said: "Suppose a person pretends to be guardian in socage, and enters into the land of the infant and takes the profits; though he is not rightful guardian, yet an action of account will lie against him. So the defendant in this case pretending to receive the moneys the debentures were sold for in the right of the intestate, why should he not be answerable for it to the intestate's administrator?"

Now, in looking at the facts of this case, we find that one person has sold something belonging to another, and received and *retained the money for it. On the facts thus stated, [*108] the law will unquestionably raise an implication of promise to pay the money to the party entitled to it. This implication, under ordinary circumstances, would be conclusive, and would support an action of assumpsit. Now, can it be any answer to such an action for the defendant to say, "True, I have turned your property into money, but I did so in denial of your right; I did so with intent to deprive you of the proceeds; in other words, I insist upon having done it as a wrong and repudiate all suggestion of agreement to pay?" The answer appears to be this: If there are in the case all the elements of an implied contract, it is of no consequence that there is, over and beyond those, some other fact or circumstance not in any way militating against the plaintiff's claim, but rather the reverse, which constitutes a tortious element and might support an action as for a tort. Here, as the defendant cannot possibly be prejudiced by that course,

the plaintiff may ignore the tortious element and rely solely upon the facts which support the implication of a promise. He may waive that which rendered the act, in the legal sense, wrongful, and rely upon the remainder.

No question is made of this doctrine, where, as a result of the tortious act, the defendant has come into possession of money belonging to the plaintiff. The law will not permit him to deny an implied promise to pay this money to the party entitled.²³

[*109] *Mr. Addison, in his treatise on the law of torts, dismisses this subject after very brief consideration. "If a man," he says, "has taken possession of property, and sold or disposed of it without lawful authority, the owner may either

23—See *Hitchin v. Campbell*, 2 W. Bl. 827; *Abbotts v. Barry*, 2 B. & B. 369; *Powell v. Rees*, 7 A. & E. 426; *Berley v. Taylor*, 5 Hill, 577; *Miller v. Miller*, 9 Pick. 34; *Gilmore v. Wilbur*, 12 Pick. 120, 22 Am. Dec. 410; *Appleton v. Bancroft*, 10 Met. 231; *Morrison v. Rodgers*, 2 Scam. 317; *Staat v. Evans*, 35 Ill. 455; *Leighton v. Preston*, 9 Gill, 201; *Gray v. Griffith*, 10 Watts, 431; *Goodenow v. Luyder*, 3 Greene (Iowa), 599; *White v. Brooks*, 43 N. H. 402; *Lord v. French*, 61 Me. 420; *Steiner Brothers v. Clisby*, 103 Ala. 181, 15 So. 612; *Geuth v. Stephens*, 87 Ill. App. 190; *Smith v. McCarthy*, 39 Kan. 308, 18 Pac. 204; *Downs v. Finnegan*, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; *Hirsch v. Leatherbee Lumber Co.*, 69 N. J. L. 509, 55 Atl. 645; *Starr Cash Car Co. v. Reinhart*, 2 Misc. 116, 20 N. Y. S. 872; *Scottish Carolina T. & L. Co. v. Brooks*, 109 N. C. 698, 14 S. E. 315; *Brittain v. Payne*, 118 N. C. 989, 24 S. E. 711; *St. John v. Antrim Iron Co.*, 122 Mich. 68, 80 N. W. 998; *Nelson v. Kilbridge*, 113 Mich. 637, 71 N. W. 1089; *Seavy v. Dana*, 61 N. H. 339; *Wescott v. Sharp*, 50 N. J. L. 392, 13 Atl. 243; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216; *Olive v. Olive*, 95 N. C. 485; *Crown Cycle Co. v. Brown*, 39 Ore. 285, 64 Pac. 451; *Pryor v. Morgan*, 170 Pa. St. 568, 33 Atl. 98; *Saville v. Welch*, 58 Vt. 683, 5 Atl. 491; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73. "The principle is," says POLLOCK, C. B., "that the owner of property wrongfully taken has a right to follow it and adopt any act done to it, and treat the proceeds as money had and received to his use." *Neat v. Harding*, 20 Law. J. Rep. (N. S.) Exch. 250; S. C. 4 Eng. L. & Eq. 464. "Subject," he adds, "to certain exceptions," which however, he does not point out. In *Hall v. Peckham*, 8 R. I. 370, it was held that where goods had fraudulently been bought without an intent to pay for them, the seller might follow them into the hands of an assignee, and if the latter had sold them, recover from him in an action for money had and received. Citing *Thurston v.*

disaffirm his act and treat him as a wrong-doer, and sue him for a trespass or for a conversion of the property, or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as an agent, he cannot afterward treat him as a wrong doer, nor can he affirm his acts in part and void them as to the rest. If, therefore, goods have been sold by a wrong-doer, and the owner thinks fit to receive the price, or part thereof, he ratifies and adopts the transaction, and cannot afterward treat it as a wrong.'²⁴ But this is scarcely doing the subject full justice. Lord Mansfield long ago held that where one refused to account for a masquerade ticket in his possession belonging to another, he might be sued in assumpsit for its value, the fact of his refusal to account for it being sufficient evidence that he had sold it.²⁵ Suppose, however, it had appeared that he had not sold it, but that he still retained and refused to surrender it; had it been asked whether, on this state of facts, the plaintiff could have recovered in assumpsit, it would have been necessary to concede that the authorities are in conflict. The decisions are quite numerous in this country that assumpsit cannot be maintained unless the property of which the plaintiff has been deprived has been converted into money.²⁶ But other cases decide that if the defendant has converted the property *in any manner to his own use, that is sufficient. The following are illustrations: Trading off the property for other property; turning one's cattle wrongfully into another's field and

Blanchard, 22 Pick. 18, 33 Am. Dec. 700. The principle applies to one who sells chattels in violation of a trust. *Rand v. Nesmith*, 61 Me. 111. And to one who steals and sells them. *Boston, etc., R. R. Co. v. Dana*, 1 Gray, 83; *Shaw v. Coffin*, 58 Me. 254, 4 Am. Rep. 290; *Howe v. Clancy*, 53 Me. 130.

24—Addison on Torts, 33, citing *Brewer v. Sparrow*, 7 B. & C. 310 and *Lythgoe v. Vernon*, 5 H. & N. 130; 29 Law J. Exch. 164.

25—*Humbly v. Trott*, Cowp. 375.

26—*Jones v. Hoar*, 5 Pick. 285; *Glass Co. v. Wolcott*, 2 Allen, 227; *Mann v. Locke*, 11 N. H. 246, 248; *Smith v. Smith*, 43 N. H. 536; *Morrison v. Rogers*, 3 Ill. 317; *O'Reer v. Strong*, 13 Ill. 688; *Kelty v. Owens*, 4 Chand. 166; *Elliott v. Jackson*, 3 Wis. 649; *Stearns v. Dillingham*, 22 Vt. 624, 54 Am. Dec. 88; *Willett v. Willett*, 3 Watts, 277; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Guthrie v. Wickliffe*, 1 A. K.

pasturing them there; employing an apprentice without the master's assent, and so on. In all these cases, it will appear, all the elements of an implied contract are found, and we can conceive of no sufficient reason for denying the right to bring *assumpsit*.²⁷

Marsh. 83; *Fuller v. Duren*, 36 Ala. 73, 76 Am. Dec. 318; *Tucker v. Jewett*, 32 Conn. 563; *Sanders v. Hamilton*, 3 Dana, 550; *Barlow v. Stalworth*, 57 Ga. 117; *Pike v. Bright*, 29 Ala. 332; *Emerson v. McNamara*, 41 Me. 565; *Quimby v. Lowell*, 89 Me. 547, 36 Atl. 902; *Androscoggin Water Power Co. v. Metcalf*, 65 Me. 40; *Grinnelle v. Anderson*, 122 Mich. 533, 81 N. W. 329. Compare *Bennett v. Francis*, 2 B. & P. 550; *Read v. Hutchinson*, 3 Camp. 352. Tort may be waived "only when subsequent to the tort which, of itself, gave a cause of action there has been the reception by the wrong-doer of money or that which he received as the equivalent of money for the property of the plaintiff." *Miller v. King*, 67 Ala. 575; *Smith v. Jernigan*, 83 Ala. 256, 3 So. 515; *Saville v. Welch*, 58 Vt. 683. So if converted note is used to pay a debt with. *Doon v. Ravey*, 49 Vt. 293. In *Noyes v. Loring*, 55 Me. 408, 412, WALTON, J., says: "It is only in favor of the action for money had and received, which has been likened in its spirit to a bill in equity, that the rule is relaxed that the evidence must correspond with the allegations and be confined to the matter in issue, and this relaxation, by which a party is allowed to aver a promise and recover for a tort, being a departure from principle and the correct rule of pleading, ought not to be extended to new cases."

27—*Miller v. Miller* 7 Pick. 133; *Budd v. Hiler*, 27 N. J. 43; *Stockett v. Watkins' Admr.* 2 G. & J. 326; *Welch v. Bagg*, 12 Mich. 42; *Hill v. Davis*, 3 N. H. 384; *Floyd v. Wiley*, 1 Mo. 430; *Ford v. Caldwell*, 3 Hill. (S. C.), 248; *Baker v. Cory*, 15 Ohio 9; *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Bowen v. School Dist.*, 36 Mich. 149; *Webster v. Drinkwater*, 5 Me. 319, 17 Am. Dec. 238; *Jones v. Buzard*, 1 Hemp. 240; *Johnson v. Reed*, 8 Ark. 202; *Labeume v. Hill*, 1 Mo. 643; *Norden v. Jones*, 33 Wis. 600, 14 Am. Rep. 782; *Hopf v. U. S. Baking Co.*, 6 Misc. 158, 27 N. Y. S. 217; *Chittenden v. Pratt*, 89 Cal. 178, 26 Pac. 626; *Galvin v. MacMin, etc., Co.*, 14 Mont. 508, 37 Pac. 366; *Challis v. Wylie*, 35 Kan. 506, 11 Pac. 438; *Downs v. Finnegan*, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; *Hirsch v. Leatherbee Lumber Co.*, 69 N. J. L. 509, 55 Atl. 645; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 18 Am. Ann. St. Rep. 803, 8 L. R. A. 216; *Crown Cycle Co. v. Brown*, 39 Ore. 285, 64 Pac. 451; *Lehmann v. Schmidt*, 87 Cal. 15, 25 Pac. 161. See also note to *Putnam v. Wise*, 1 Hill. 240, 37 Am. Dec. 309; note to 2 Greenl. Ev. § 108. In *Schweitzer v. Weiber*, 6 Rich. 159, this doctrine was held applicable to the case of one who had wrongfully taken property, and in whose hands it had been accidentally destroyed. "The tort may be waived and as-

"If the wrong-doer has not sold the property, but still retains it, the plaintiff has the right to waive the tort and proceed upon an implied contract of sale to the wrong-doer himself, and, in such event, he is not charged up for money had and received by him to the use of the plaintiff. The contract implied is one to pay the value of the property, as if it had been sold to the wrong-doer by the owner."^{27a} But by all the authorities it is conceded that where the act is a naked trespass an action of assumpsit can-

sumpsit maintained whenever the property taken has been converted either into money or into any other beneficial use by the wrong-doer, and especially where it has been so applied to his use as to lose its identity" (citing text). "So long as the trespasser retains in its original shape the property taken, he may logically deny that he holds it under a contract * * * but when he has parted with it either for money or other property or when he has mingled it with his own, or consumed it in its use or changed its form, he should not be permitted to deny the assumption to pay its value which the law imputes from his method of dealing with it." Here trees cut but not sold. *Evans v. Miller* 58 Miss. 120. "When goods or things have been wrongfully taken or converted, whether sold or disposed of or not by the wrong-doer, the tort may be waived, the transaction treated as a sale and an action maintained upon the implied promise to pay the price or value of the goods." * * * But where "damages have been committed by one's cattle to the crops or personal property of another, without the owner's participation in the trespass or benefit therefrom and in the absence of any promise," the injured party can-

not recover damages *ex contractu*. *Tightmeyer v. Mongold*, 20 Kan. 90. If the possession is acquired as the result of contract relations and the article is kept and not turned into money, assumpsit lies. *Coe v. Wager*, 42 Mich. 49; *McLaughlin v. Salley*, 46 Mich. 219. See, also, *Halleck v. Mixer*, 16 Cal. 574; *Cooper v. Berry*, 21 Ga. 526; *Randolph Iron Co. v. Elliott*, 34 N. J. 184.

27a—*Terry v. Munger*, 121 N. Y. 161, 165, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216. In *Hirsch v. Leatherbee Lumber Co.*, 69 N. J. L. 509, 55 Atl. 645, the court says: "If one who has *rightfully* converted the personal property of another to his own use is held bound by an implied promise to pay to the owner its reasonable value, certainly he who has *wrongfully* converted such property must be held to the same implied undertaking. To permit him to deny the promise would enable him to take advantage of his own wrong. The tort-feasor, in such circumstances, may, at the option of the party injured, be treated as having purchased the goods in question without stipulation as to their price, and be held liable in assumpsit for their market value," pp. 513, 514.

not be maintained, because the elements of an assumpsit are wanting. In most cases this is clear enough. Suppose one commits an assault and battery upon another, there is absurdity in the suggestion of a contract that the one party should permit this and the other should pay for it a reasonable compensation.^{27b} Suppose his cattle have invaded his neighbor's premises and trampled down and destroyed his crops, the ground for an implication of contract is equally wanting. There is a wrong, nothing [*111] more and nothing *less.²⁸ We cannot imply a contract that one party should proceed to destroy the other's crop and then pay him for it. That is an unnatural transaction, and we cannot suppose it would take place except as a wrongful act.^{28a} But where a trespass is committed and trees or mineral is severed from the land and taken by the trespasser and converted to his own use, assumpsit will lie for the value of the material so converted.^{28b}

27b—See *Raymond v. Lowe*, 87 Me. 329, 32 Atl. 964.

28—See *Noyes v. Loring*, 55 Me. 408, where the authorities on this point are collected. In that case a party fraudulently procured an advertisement to be published at the expense of the town, and he was held not to be liable in assumpsit. A mere detention of a chattel is not enough. *Weiler v. Kershner*, 109 Pa. St. 219; *Tolan v. Hodgeboom*, 38 Mich. 624. To try the title to use of water assumpsit on an implied promise to pay for the use of it, will not lie. *North Haverhill, etc., Co. v. Metcalf*, 63 N. H. 427. See, also, *Watson v. Stever*, 25 Mich. 386; *Moses v. Arnold*, 43 Iowa, 187, 22 Am. Rep. 239; *Finlay v. Bryson*, 84 Mo. 664; *Sandeen v. R. R. Co.*, 79 Mo. 278.

28a—In *Krause v. Pa. R. R. Co.*, 4 Pa. Co. Ct. 60, the court says: "But I know of no case in which a plaintiff was allowed to allege

and recover upon an implied promise to pay the damages caused by the negligence of the defendant," p. 65.

28b—*Downs v. Finnegan*, 53 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488. In this case the court, referring to the rule that when property has been converted, the tort may be waived and assumpsit maintained, says: "But certain it is that the rule has been extended to cases where there has been a wrongful conversion of property of one person to the use of another, whether sold or not by the latter, and also to cases where a trespasser has severed trees from land in possession of the owner, or has quarried stone thereon, and has afterwards taken the trees or the stone away, converting the same to his own use, so that trover or replevin might be maintained. That the doctrine has been greatly developed and ex-

Torts by Relation. There are many cases in which one's right to institute proceedings for a wrong may only accrue after the wrong has been committed, and where, if he is wronged at all it must be by relation. The bankrupt law affords an illustration: the title of the assignee in bankruptcy relating back to the time when the act of bankruptcy was committed, so as to avoid all dispositions of his property made by the bankrupt after that time. The question then arises, what remedy the assignee may have against those who may have intermeddled with the goods, intermediate the act of bankruptcy and the suing out of the commission; and the rule, in England, is that trover may be brought for the value,²⁹ but not trespass.³⁰ *It is a gen- [*112] eral rule that one shall not be made trespasser by relation;³¹ but the rule will not prevent a party who has been wronged by unauthorized action before his title became perfected obtaining redress in some form of action; and if the injury consisted in making way with personal property, trover, in which the value might be recovered, would be the appropriate action, while trespass for the recovery of indefinite damages might not lie.³² So case may be brought against one committing waste upon lands intermediate a purchase on execution and the time when

tended in application is apparent, and that in cases where property has been severed from real estate by a wrong-doer, carried from the freehold, and converted to his own use, the rightful owner may sue and recover its value as on implied contract, is thoroughly established, although it may not be in harmony with the principles of the reformed system of pleading. No reason exists why, if permissible at all, it should not include cases arising out of trespass, to the extent that the property severed and carried away is beneficial to the trespasser, except when it would involve a trial of title to real estate." pp. 118-9.

29—*Balme v. Hutton*, 9 Bing.

471, in which all prior cases are carefully reviewed. An assignee rightfully took possession of goods, but converted them prior to the appointment of a receiver. The latter was allowed to bring trover. *Terry v. Bamberger*, 14 Blatchf. 234.

30—*Smith v. Clarke*, 1 T. R. 475.

31—*Case v. DeGoer*, 3 Caines, 261; *Jackson v. Douglass*, 5 Cow. 458; *Wickham v. Freeman*, 12 Johns. 183; *Bacon v. Kimmel*, 14 Mich. 201. See *Heath v. Ross*, 12 Johns. 140; *Hess v. Griggs*, 43 Mich. 397; *Ward v. Carp River Iron Co.*, 50 Mich. 522.

32—*Balme v. Hutton*, 9 Bing. 471.

the title was perfected by deed,³³ and where a trespass was committed upon lands held in trust during a vacancy in the office of trustee and a trustee was afterwards appointed, it was held that his title related back and that he could sue for the wrong.³⁴ In the case of estates of deceased persons, however, the distinction between trespass and case as a remedy for wrongs intermediate the death of the testator or intestate and the issue of letters, does not appear to have been recognized, and the personal representative has been allowed to recover in either form of action, according as the facts would have warranted it had letters been issued before the wrong was done.³⁵

33—*Stout v. Keyes*, 2 Doug. v. *Broughton*, 100 Mo. 406, 13 S. (Mich.) 184, 43 Am. Dec. 465. W. 877.

Trover will lie against the purchaser of logs cut by a trespasser between sale and delivery of deed. 35—*Sharpe v. Stallwood*, 5 M. & Gr. 760; *Searson v. Robinson*, 2 Fost. & F. 351; *Carlisle v. Benley*, 3 Me. 250; *Valentine v. Jackson*, 9 Wend. 302; *Manwell v. Briggs*, 458, 57 Am. Rep. 68. 17 Vt. 176; *Brackett v. Hoitt*, 20

34—*Allison v. Little*, 93 Ala. 150, 9 So. 388. And see *Girard N. H. 257*; *Bell v. Humphrey*, 11 *Life Ins. Co. v. Mangold*, 94 Mo. Humph. 451; *Marcey v. Howard*, App. 125, 67 S. W. 955; *Chouteau* 91 Ala. 133, 8 So. 566.

THE PARTIES WHO MAY BE HELD RESPONSIBLE FOR TORTS.

The rules of law respecting the capacity to form contract relations, and the consequent liability for failure to observe such as are entered into, are in the main very precise and definite. Leaving out of view a few exceptional cases, and speaking generally, it may be said that one is not authorized to deal with others on the footing of contract, unless he is of the full age of twenty-one years; and that he cannot make the most simple agreement, or enter into the most ordinary legal obligation a day earlier. Neither can he enter into contracts if he is unsound in mind; but his care and protection, and the making of contracts therefor must devolve upon others. The rules of law on this subject have in view the protection of classes supposed, from their immaturity and weakness, incapable of fully protecting themselves; and though to some extent they are necessarily arbitrary, they are not, because of that quality, a hardship or grievance to those whom they preclude from entering into contracts. Neither are they a hardship or grievance to others whom they deprive of the opportunity to make contracts with immature or imbecile people. As the gains which might be derived from such contracts would be likely to be gains at the expense of those incompetent to protect their own interests, there can be no just complaint of the law which precludes them.

There are also rules of a like definite character as regards criminal responsibility. An infant under the age of seven can commit no offense against the State. The reason is, that at that immature period he is incapable of understanding political or social duties or obligations, and the law assumes, as a conclusion not to be disputed—not to be put aside by the uncertain judgment of others—that he cannot harbor a criminal intent. After

that age, until he reaches fourteen, the case is open to proof of actual capacity and actual malice. An idiot or an insane [*114] *person is also incapable of committing a crime, and to punish one of these as a criminal would be to punish him for a mere animal or insane impulse, or for mere unreasoning and motiveless action, for which he was in no proper sense responsible; to punish him, in short, for his misfortune. The right of the State to protect its people against injurious acts by such persons, and for that purpose to put them under restraints or into confinement, is plain enough; but to punish, as for a wrong, a party incapable of indulging an evil intent is a mere barbarity; not useful as a discipline to the individual punished, and of evil example instead of warning to others. It is, therefore, never to be provided for, but carefully to be guarded against. It is no doubt true that insane persons accused of crime are sometimes convicted and suffer punishment; but this is never intended, and it is attributable to difficulties inherent in such cases; difficulties in discriminating between mental disease and criminal perversion; difficulties in testimony, and infirmities in tribunals. Such results are the misfortunes and accidents of criminal administration, not results at which it aims.

In determining whether there shall be civil responsibility for wrongs suffered, a standpoint altogether different is occupied. A wrong is an invasion of right, to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose, or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore the law, in giving redress, has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. A blow by a youth of eighteen may inflict as serious an injury as a blow by a man of mature years, and the torch of a child may destroy a house as effectually as though applied on the twenty-first birthday, instead of the tenth. If, therefore, redress is the object of the law, the party injured should have the same redress in the one case as is provided for him in the other. Neither is it now protection to

society that is sought, except as any enforcement of just laws tends incidentally to its protection. There is consequently no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him; for, as is said in an early case "the reason is, because he *that is damaged ought to be recompensed."¹ If recom- [*115] pense is what the law aims at, it is readily perceived that the question of civil responsibility for wrongs suffered is one that directs our attention chiefly to the injury done; and that the weakness of the party committing it, or the absence of any deliberate purpose to injure, must commonly be of little or no importance.

Wrongs by Lunatics, etc. The case of an injury suffered at the hands of a lunatic furnishes us with an apt illustration. Let it be supposed that one of this unfortunate class meets a traveler on the highway, and, by force, or by the terror of his threats, takes from him his horse and vehicle, and abuses or destroys them. In a sane person this may have been highway robbery; but the lunatic is incapable of a criminal intent, and therefore commits no crime. Neither is the case one in which a contract to pay for the property, or for the injury, can be implied, for the law can imply no contract relations where the capacity to enter into them is withheld. But a plain wrong has been done, because the traveler has been forcibly deprived of his property; and if the person at whose hands the wrong has been suffered is possessed of an estate from which compensation can be made, no reason appears why this estate should not be burdened to make it. In other words, it seems but just that the consequences of the unfortunate occurrence should fall upon the estate of the person committing the injury, rather than upon that of the person who has suffered it.²

1—*Lambert v. Bersey*, L. Raym. 660, 13 N. E. 239, 2 Am. St. Rep. 421. See *Bersey v. Olliott*, L. 140; *Ancient Order of United Workmen v. Holdom*, 51 Ill. App.

2—*Morse v. Crawford*, 17 Vt. 200; *Williams v. Hays*, 143 N. Y. 499; *S. C. Ewell's Leading Cases*, 442, 38 N. E. 449, 42 Am. St. Rep. 635; *McIntyre v. Sholty*, 121 Ill. 743, 26 L. R. A. 753; *Mutual Fire*

One eminent law writer has doubted if there ought to be any responsibility in such a case. "In the case of a *compos mentis*," he says, "although the intent be not decisive, still the act punished is that of a party competent to foresee and guard against the consequences of his conduct; an inevitable accident has always been held an excuse. In the case of a lunatic it may be urged both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accident."³

[*116] *This view has plausibility, and it would be perfectly sound and unanswerable if punishment were the object of the law when persons unsound in mind are the wrong doers. But when we find that compensation for an injury received is all that the law demands, the plausibility disappears. Undoubtedly there is some appearance of hardship—even of injustice—in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question of liability in these cases, as well as in others, is a question of policy; and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose.

Ins. Co. v. Showalter, 3 Pa. Supr. Ct. 452.

3—Sedgwick on Damages, 455.
The cases on the subject of the lia-

bility of persons *non compos* are well collected in Ordonaux's Judicial Aspects of Insanity, Chapter VII.

All questions of public policy must be settled on a consideration of what on the whole is the rule that will best subserve the general welfare. Among the considerations bearing on the proper rule in the case of an incompetent person are such as relate to the appointment of a committee or guardian empowered by law to take charge of him and restrain his action so as to prevent injury to himself or to others. The appointment of this custodian is properly attended to by relatives or friends; those who have a personal or family interest in him, or who might be entitled to succeed to his estate if it were preserved. Would it not be an important stimulus to their action if the estate is to be held responsible for all injuries committed by him to others; and would it not tend to indifference on their part if the law were to leave any injured party to bear the loss without redress? Unless these questions can be answered in the negative, the reasons for holding his own state responsible seem conclusive, *for the State at large is deeply concerned in hav- [*117] ing all incompetent persons in charge of competent and responsible guardians, whose business it shall be to care for them and to guard both them and the public against such injuries as would be likely to result from their condition.

Another important consideration is derived from the fact that the distinction between insanity and the cunning of malice is not always sufficiently clear for ready detection, and a rule of irresponsibility in respect to such persons would be likely to result in similar difficulties in civil cases to those which have brought the administration of criminal law into disrepute wherever the plea of insanity is interposed. Nothing could present to the depraved mind a stronger temptation to simulate insanity for purposes of mischief and revenge than a rule of law which would give full immunity in case the deception proved successful, and which would put at risk where it did not only the amount of actual injury inflicted; and this, too, in the case of those disorders, real or pretended, the evidences of which are often so vague, intangible and deceptive that experts sometimes fail to see them when they unquestionably exist, and perceive them with distinctness when they do not. It is generally believed, and

with abundant reason, that sometimes in the administration of the criminal law, persons who are abnormal only in ungovernable passion and depravity escape the proper consequences of their criminal conduct on a plea of mental disease; and on the other hand a careful observation of the workings of criminal tribunals will leave upon the mind no doubt that the jury that should dispassionately try the question of criminal responsibility, is sometimes urged on and impelled by public passion and clamor to find in the freaks of delusion the evidences of criminal intent and depravity, and to convict and punish those who are only deserving of compassion. That evils of this sort are inseparable from the administration of the criminal law must probably be admitted; but they have no necessary place where only civil redress is given, and it seems better to exclude them by an invariable rule that mental disease or infirmity shall be no defense to an action for tort.

The reasons that have controlled in these cases are not very clearly set forth by the authorities, but the law has always held insane persons and other incompetents responsible for [*118] *damages resulting from their tortious actions,⁴ and it has given all the usual remedies against them, even to the very severe one of the taking of the body in execution while that barbarous mode of compelling redress was allowable in other cases.⁵

In *McIntyre v. Sholty*,⁶ the court says: "There is, to be seen,

4—2 Saund. Pl. and Ev. 318, 1163; 1 Chit. Pl. 76; Shearm. & Redf. on Neg. § 51, 57; Broom Com. 684, 857; *Weaver v. Ward*, Hob. 134; *Moore v. Crawford*, 17 Vt. 499; *Bush v. Pettibone*, 4 N. Y. 300; *Krom v. Schoonmaker*, 3 Barb. 650; *Cross v. Kent*, 32 Md. 581; *Behrens v. McKenzie*, 23 Iowa, 343, 92 Am. Dec. 428; *Lancaster Co. Bank v. Moore*, 78 Penn. St. 407, 412; *Ward v. Conatser*, 4 Bax. 64; *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140; *Ancient Order of United Workmen v. Holdom*, 51 Ill. App.

200; *Williams v. Hays*, 143 N. Y. 442, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153; *Mutual Fire Ins. Co. v. Showalter*, 3 Pa. Supr. Ct. 452. So for injury from defective condition of his real estate. *Morain v. Devlin*, 132 Mass. 87, 42 Am. Rep. 423. An execution upon a judgment in tort is not vitiated by defendant's lunacy at the time of the judgment or the sale. *White v. Farley*, 81 Ala. 563.

5—*Ex parte Leighton*, 14 Mass. 207.

6—121 Ill. 660, 664, 665, 13 N. E. 239, 2 Am. St. Rep. 140. "There

an appearance of hardship in compelling one to respond for that which he is unable to avoid for want of the control of reason. But the question of liability in these cases is one of public policy. If an insane person is not held liable for his torts, those interested in his estate, as relatives or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries upon others. There is more injustice in denying to the injured party the recovery of damages for the wrong suffered by him, than there is in calling upon the relatives or friends of the lunatic to pay the expenses of his confinement, if he has an estate ample enough for that purpose. The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons. Again, if parties can escape the consequences of their injurious acts upon the plea of lunacy, there will be a strong temptation to simulate insanity with a view of masking the malice and revenge of an evil heart."

But it does not follow that the responsibility of persons mentally incompetent should be co-extensive in all respects with that of other persons. If compensation to the person wronged is what is aimed at, the difference in some cases will be very manifest; for sometimes that which might be seriously injurious if done by a person *sui juris*, will be perfectly harmless when the actor is insane. In other cases where that which is done is unquestionably injurious, the extent of the injury will depend very largely on the presence or absence of an actual evil design. An illustration of the class last mentioned is afforded by the case of *Krom v. Schoonmaker*.⁷ There a magistrate was sued for

can be no distinction as to the liability of infants and lunatics, between torts of non-feasance and of misfeasance—between acts of pure negligence and acts of trespass. The ground of liability is the damage caused by the tort. That is just as great whether caused by negligence or trespass; the injured party is just as much entitled to compensation in the

one case as in the other, and the incompetent person must, upon principles of right and justice and public policy, be just as much bound to make good the loss in the one case as the other; and I have found no case which makes the distinction." *Williams v. Hays*, 143 N. Y. 442, 451, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153. 7—3 Barb. 650.

issuing void process on which the plaintiff was arrested. The case, on its facts, seemed one of gross outrage. It was proved that the magistrate had no complaint before him; that he refused bail after the arrest, and that he avowed a determination to pursue the plaintiff until he should be incarcerated in prison under a conviction. This made out a case of very serious oppression and wrong, such as a jury would be warranted in condemning by a heavy award of what are sometimes called punitive or vindictive damages. But when it was shown that the magistrate was insane, all the aggravation of the wrong disappeared. A sane man could only have done such an act from malice, and the outrage and injury to the arrested party would be greatly enhanced by the motive. The insane man could have no malice, but would probably act under the delusion that official duty impelled him. [*119] *The aggravation of motive would consequently be wholly wanting. While, therefore, the sane person might justly be compelled to pay damages proportioned to the malignity of his motives, the insane person would make full reparation if he were required to meet the actual damages which the injured party had suffered in person or estate, leaving wholly out of view any aggravation which malice might have supplied.⁸

This, it will be perceived, is a very important difference in the responsibility of competent and incompetent persons in some cases. But there are other cases in which the differences must be greater still. It has been seen that in some cases malice is a necessary ingredient in the tort. How can a *non compos* be responsible in such cases; such, for instance, as malicious prosecution or libel? Legal malice certainly cannot be imputed to one who in law is incompetent to harbor an intent. It would seem a monstrous absurdity, for instance, if one were held entitled to maintain an action for defamation of character for the thoughtless babbling of an insane person to his keepers, or for any wild communication he might send through the mail, or post

8—So held where the wrong was an act of violence. *McIntyre v. Mutual Fire Ins. Co. v. Showalter*, 3 Pa. Supr. Ct. 452. 2 Am. St. Rep. 140. See also *Sholty*, 121 Ill. 660, 13 N. E. 239.

upon the wall. There can be no tort in these cases, because the wrong lies in the intent, and an intent is an impossibility. The rules which preclude criminal responsibility are strictly applicable here, because there is an absence of the same necessary element.⁹ And if, in the case of defamatory publications, it be said that after all the requirement of malice as an element in the wrong is only nominal, still there can be no tort, because presumptively the utterances, or rather publications, which proceed from a diseased brain cannot injure.

***Torts by Infants.** The general rule is that an infant [*120] is responsible for his torts, as any other person would be.¹⁰ The following cases are illustrations: Where boys of twelve and fourteen trespassed upon a school district and disturbed the school;¹¹ where a boy of six broke and entered the plaintiff's premises and broke down and destroyed his shrubbery and flowers;¹² where an infant committed a disseisin and eject-

9—Irvine v. Gibson, 117 Ky. 306; Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58; Horner v. Marshall, 5 Munf. 466; Bryant v. Jackson, 6 Humph. 199; Yeates v. Reed, 4 Blackf. 463, 32 Am. Dec. 43; Gates v. Meredith, 7 Ind. 440. In this last case it was decided that insanity, though caused by drunkenness, would preclude responsibility for what would otherwise be slander. "Slander must be malicious. An idiot or lunatic, no matter from what cause he became so, cannot be guilty of malice. He may indulge the anger of the brute, but not the malice of one who knows better." PERKINS, J. So in Irvine v. Gibson, 117 Ky. 306, it was held that an action would not lie against an insane person for slander. In Horner v. Marshall, 5 Munf. 466, the collection of a judgment for slander was enjoined, on the ground that the defendant at the time of the speaking was in a state of partial men-

tal derangement on the subject to which the speaking related.

10—Burnard v. Haggis, 14 C. B. (N. S.) 45; Mills v. Graham, 4 B. & P. 140; Campbell v. Stakes, 2 Wend. 138, 19 Am. Dec. 561; Hartfield v. Roper, 21 Wend. 620, 34 Am. Dec. 273; Neal v. Gillett, 23 Conn. 437; Sikes v. Johnson, 16 Mass. 389; Walker v. Davis, 1 Gray, 506; Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81; Stringer v. Frost, 116 Ind. 477, 19 N. E. 331, 9 Am. St. Rep. 875, 2 L. R. A. 614; Smith v. Davenport, 45 Kan. 423, 25 Pac. 851, 11 L. R. A. 429; Becker v. Mason, 93 Mich. 336, 53 N. W. 361; Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64; McCabe v. O'Connor, 4 App. Div. 354, 38 N. Y. S. 572; Fry v. Leslie, 87 Va. 269, 12 S. E. 671.

11—School District v. Bragdon, 23 N. H. 507.

12—Huchting v. Engel, 17 Wis. 230, 84 Am. Dec. 741.

ment was brought against him;¹³ where an infant lessee carried off and converted to his own use crops to which he was not entitled;¹⁴ where an infant employe embezzled his employer's property which had been committed to his charge;¹⁵ where an infant induced another to commit a trespass;¹⁶ and so on.

In cases like the foregoing, the intent with which the wrongful act is done, is unimportant, except as it may, in some of them, bear upon the quantum of damages. But in those cases in which malice is a necessary ingredient in the wrong, an infant may or may not be liable, according as his age and capacity may [*121] justify *imputing malice to him or preclude the idea of his indulging it. The case of alleged defamation affords a suitable illustration. The absurdity of a suit against a child three years old would be sufficiently manifest, but not more so than the granting of immunity to the malicious utterances of a youth of twenty. And while it would be impossible to name any age which should constitute the dividing line between responsibility and irresponsibility in these and all similar cases, there

13—*Marshall v. Wing*, 50 Me. 62, citing *McCoon v. Smith*, 3 Hill, 147, 38 Am. Dec. 623; *Beckley v. Newcomb*, 24 N. H. 363.

14—*Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429, citing *Green v. Sperry*, 16 Vt. 392, 42 Am. Dec. 519. See, also, *Walker v. Davis*, 1 Gray, 506; *Green v. Sperry*, 16 Vt. 390; *Oliver v. McClellan*, 21 Ala. 675. An infant stakeholder of an illegal wager is liable in trover for a refusal to deliver back the stakes on demand. *Lewis v. Littlefield*, 15 Me. 233. But an infant is not liable for conversion where the relation between the parties is one of bailment, and the real grievance of the plaintiff is the failure of the infant to perform his contract. *Root v. Stevenson*, 24 Ind. 115. See *Curtin v. Patton*, 11 S. & R. 305.

15—*Peigne v. Sutcliffe*, 4 McCord, 387. Further, as to conversions, see *Manby v. Scott*, 1 Sid. 129; *Bristow v. Eastman*, 1 Esp. 172; *Conklin v. Thompson*, 29 Barb. 218; *Moore v. Eastman*, 1 Hun, 578; S. C. 4 N. Y. Sup. Ct. (T. & C.) 37.

16—*Sykes v. Johnson*, 16 Mass. 389. In respect to trespasses, it is said in this case, "There is no exception in the law in favor of *femmes covert* or minors." An infant held liable for seduction, *Becker v. Mason*, 93 Mich. 336, 53 N. W. 361; for reckless driving, *Stringer v. Frost*, 116 Ind. 477, 19 N. E. 331, 9 Am. St. Rep. 875, 2 L. R. A. 614; for the fall of a wall due to negligence, *McCabe v. O'Connor*, 4 App. Div. 354, 38 N. Y. S. 572.

would be no difficulty in reaching the conclusion that for all malicious injuries the wrong doer should be held responsible if he has arrived at an age and a maturity of mind which should render him morally responsible for the consequences of intentional action. All general statements that an infant is responsible like any other person for his torts, are to be received with the qualification that the tort must not be one involving an element which in his particular case must be wanting. If a child less than seven years of age cannot be held responsible for a larceny because of defect of understanding and incapacity to harbor a felonious intent, it would seem preposterous to hold him responsible for a slander, the moral quality of which he would be much less likely to appreciate, and injury from which must be purely imaginary.

But not only is the fact of infancy important in cases in which malice is an ingredient in the tort, but it is not without its influence in other cases. Torts springing from negligence may be instanced. While an infant is liable for these, the question of actual maturity and capacity is important, not only as it may bear upon the question whether negligence actually existed, but also as it may guide in determining whether the plaintiff in the particular transaction was not himself chargeable with fault.¹⁷ *Whoever has transactions with a person of im- [*122] mature and slender capacity, or is so brought into relations with such a person that the negligence of the latter may

17—*Neal v. Gillett*, 23 Conn. 437. In this case infants from 13 to 18 years of age were sued in case for negligently frightening a horse in playing a game of ball, causing him to, run away. SANFORD, J. says, p. 442: "The youngest of these defendants was thirteen years of age, and in the absence of all proof to the contrary, must be presumed to have been emancipated from the dominion of mere childish instincts; and we think it would be mischievous to hold that persons of the age of thirteen

years are, on account of their youth alone, absolved from the obligation to exercise their rights with ordinary care. It may not be easy to fix upon the exact age when childish instinct and thoughtlessness shall cease to be an excuse for conduct which in an adult would be considered and treated as a want of ordinary care; but it is sufficient for the determination of this point that these defendants had clearly passed that age."

expose him to injury, may reasonably on his own part be charged with a higher degree of care and caution than could be required of him in the like dealings or under similar circumstances with other persons. But, putting aside all question of contributory want of care, on the part of the person injured, the liability of the infant rests on the same ground with that of other persons. If an injury has been suffered by another for the want of ordinary care and prudence on his part, he is responsible.¹⁸

What shall be deemed to constitute ordinary care and prudence on his part is a question to be considered hereafter.

The fact that an act committed by an infant was advised or commanded by one occupying a position of influence or authority over him is not important when an action of tort is brought against him, as it might be in some cases, were a criminal prosecution to be instituted. The person who has sustained the injury may always look for redress to the person committing it, and he is under no obligation to inquire whether some other person may not have been instrumental in causing it. That fact would be important only in case he should elect to hold such other person responsible. Therefore it is no defense for the infant, that in what he did he was merely obeying his father's command.¹⁹

A father is not liable, merely because of the relation, for the torts of his child, whether the same are negligent or willful.²⁰ He is liable only on the same grounds that he would be liable for the wrong of any other person, as that he directed or ratified the act, or took the benefit of it, or that the child was at the time

18—"This is necessary, because otherwise there would be no redress for injuries committed by such persons, and the anomaly might be witnessed of a child, having abundant wealth, depriving another of his property without compensation." *Shearm. & Redf. on Neg.*, § 57.

19—*Humphrey v. Douglass*, 10 Vt. 71; *Scott v. Watson*, 46 Me. 362, 74 Am. Dec. 457. See *Tift v.*

Tift, 4 Denio, 175; *Wilson v. Garrard*, 59 Ill. 51.

20—*Shockley v. Shepherd*, 9 Houst. 271, 37 Atl. 173; *Chastain v. Johns*, 120 Ga. 977, 48 S. E. 343; *Malmberg v. Bartos*, 83 Ill. App. 481; *Palm v. Iverson*, 117 Ill. App. 535; *Baker v. Morris*, 33 Kan. 580; *Smith v. Davenport*, 45 Kan. 423, 25 Pac. 851, 23 Am. St. Rep. 737, 11 L. R. A. 429; *Panley's Guardian v. Draine*, 9 Ky. L. R. 693; *Maddox*

acting as his servant.²¹ There is no necessary presumption that the child is acting as a servant of the father,²² but it will be so presumed when the child is living at home and using his father's team with which he does the wrong.²³

An infant, as the owner or occupant of lands, is under the same responsibility with other persons for any nuisance created or continued thereon to the prejudice or annoyance of his neighbors, and for such negligent use or management of the same, by himself or his servants, as would render any other owner or occupant liable to an adjoining proprietor. Here, also, the intent is immaterial. The wrong consists in the fact that enjoyment of one's own property or rights is diminished or destroyed by an improper use or unreasonable use or misuse of the property of another.

*There are some cases, however, in which an infant [*123] cannot be held liable as for tort, though on the same state of facts a person of full age and legal capacity might be. The distinction is this: If the wrong grows out of contract relations, and the real injury consists in the non-performance of a contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it as a tort. The reason is obvious: To permit this to be done would deprive the infant of that shield of protection which, in matters of contract, the law has wisely placed before him. Therefore, if case be brought against an infant for the immoderate use and want of care of a horse which has been bailed to him, infancy is a good defense; the gravamen of the complaint being merely a breach of the implied contract of bailment.²⁴ So

v. Brown, 71 Me. 432, 36 Am. Rep. 737, 11 L. R. A. 429; *Hower v.* 432; *Brohl v. Lingeman*, 41 Mich. Ulrich, 156 Pa. St. 410, 27 Atl. 37; 711; *Schlossberg v. Lahr*, 60 How. Kumber *v. Gilham*, 103 Wis. 312, Pr. 450; *Kumba v. Gilham*, 103 79 N. W. 325.
Wis. 312, 79 N. W. 325. 22—*Kumber v. Gilham*, 103

21—*Shockley v. Shepherd*, 9 Wis. 312, 79 N. W. 325.
Houst. 271, 37 Atl. 173; *Chastain v. Johns*, 120 Ga. 977, 48 S. E. 343; *Smith v. Davenport*, 45 Kan. 336. See *Manby v. Scott*, 1 Sid.

23—*Schoefer v. Osterbrink*, 67 Wis. 495, 30 N. W. 922.
24—*Jennings v. Rundall*, 8 T. R. 336. See *Manby v. Scott*, 1 Sid.

infancy is a defense to an action by a ship owner against his supercargo for a breach of his instructions regarding a sale of the cargo, whereby the same was lost or destroyed.²⁵

So if an infant effects a sale by means of deception and fraud, his infancy protects him. The general rule on this subject has been given in a recent case as follows: "An infant is liable in an action *ex delicto* for an actual and willful fraud only in cases in which the form of action does not suppose that a contract has existed; but where the gravamen of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense. For simple deceit on a contract of sale or exchange there is no cause of action, unless some damage or injury results from it; and proof of damage could not be made without referring to and proving the contract. An action on the case for deceit on a sale is an affirmance by the plaintiff of the contract of sale; and the liability of the defendant in such an action could not be established without taking notice of and proving the contract."²⁶ Lord Chief Justice GIBBS states

[*124] the same rule more concisely: "Where the substantial ground of action rests on promises, the plaintiff cannot, by changing the form of action, render a person liable who would not have been liable on his promise."²⁷

129; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Root v. Stevenson*, 24 Ind. 115; *Young v. Nubling*, 48 App. Div. 617, 63 N. Y. S. 181. In this case it is said: "It is essential, to hold an infant for trespass in a suit like this, to show that the injury to the horse was willful and intentional. A mere lack of moderation in driving and a failure to observe due care, when there is no willful and intentional injury, will not suffice to render an infant liable," p. 620.

25—*Vasse v. Smith*, 6 Cranch, 126; S. C. 1 Am. Lead. Cas. 237; S. C. Ewell's Lead. Cas. 195. See *Studwell v. Shapter*, 54 N. Y. 249.

26—*Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659, per KELLOGG, J. S. C. Ewell's Lead. Cas. 201. See *Graves v. Neville*, 1 Keb. 778. In *Word v. Vance*, 1 Nott & McC., 197, 9 Am. Dec. 683, an infant was held liable in case on a false warranty, but the point is apparently not much considered. One claiming to have been defrauded by an infant in a horse trade, brought replevin. Inasmuch as this was not an action for deceit in affirmance of the sale, which would not lie, it was held he might show the fraud. *Nolan v. Jones*, 53 Ia. 387.

27—*Green v. Greenbank*, 2 Marsh. 485.

And the same rule applies if, in the purchase of property, he is guilty of fraud or deception, by means whereof the owner is induced to make a sale.²⁸

Where an infant was entrusted with goods to be sold for cash only and he sold the same on credit, it was held that he could not be made liable in trover, as the gravamen of the action was a breach of contract.²⁹ The defendant, an infant, contracted to thresh the plaintiff's wheat with his steam thresher. Owing, as alleged, to the lack of a spark arrester and to the manner of locating the engine with respect to the wind, the plaintiff's wheat and barn were destroyed. It was held that the defendant was not liable, as the real ground of action was negligence in the performance of a contract.³⁰ "The test of an action against an infant," says the court, "is whether a liability can be made out without taking notice of the contract."

There are cases in which it has been decided that if property is bailed to an infant for a definite purpose, and he does in respect to it some specific wrongful act not warranted by the bailment, and which would have rendered any other person responsible to the bailor in an action as for a conversion, the infant is also liable to a like action. Thus, it has been held that an infant who hires a horse to go to a place agreed upon, but drives him to another, in a different direction, is liable in trover for an unlaw-

28—In *Wallace v. Morss*, 5 Hill, 391, an infant is held by the court (COWEN, J.,) "chargeable by action for a tort in obtaining goods fraudulently, with an intention not to pay for them; but this is explained in a subsequent case as having been probably an action of trover to recover the value of goods obtained by false representations, and the title to which consequently did not pass." *Campbell v. Perkins*, 8 N. Y., 430, 440.

29—*Caswell v. Parker*, 96 Me. 39, 51 Atl. 238. Says the court: "It is a general rule that when the substantial ground of action is

contract, a party cannot, by declaring in tort, make the infant liable, when he would not have been in an action of contract. While it is true as a general proposition of law that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*." To same effect, *Stone v. Rabinowitz*, 45 Misc. 405, 90 N. Y. S. 301.

30—*Lowery v. Cate*, 108 Tenn. 54, 64 S. W. 1068, 91 Am. St. Rep. 744, 57 L. R. A. 673.

ful conversion of the horse.³¹ Such an action, it is said, is not founded on the contract, and it is not necessary to show the contract in a suit for the conversion.³²

It has also been held, that if an infant hires a horse, and is guilty of such violence and cruelty as to cause its death, an action of trespass may be maintained against him, though, had an action been brought on the contract of bailment, infancy would have been a defense. "If the infant does any willful and positive act, which amounts on his part to an election to disaffirm the contract, the owner is entitled to the immediate possession. [*125] If he willfully and intentionally injures the animal, an action of trespass lies against him for the tort. If he should sell the horse, an action of trespass would lie, and his infancy would not protect him." But "if the plaintiff declares in case, he affirms the contract of hiring, and the plea of infancy is a good defense to such an action; for he cannot affirm the contract, and at the same time, by alleging a tortious breach thereof, deprive the defendant of his plea of infancy."³³ "From the moment an infant becomes a trespasser," it is said, in another case following this, "his plea of infancy fails him."³⁴ But as

31—*Homer v. Thwing*, 3 Pick. 492; S. C. Ewell's Lead. Cas. 188. See, also, *Fish v. Ferris*, 5 Duer, 49; *Woodman v. Hubbard*, 25 N. H. 73, 57 Am. Dec. 310; *Towne v. Wiley*, 23 Vt. 355, 46 Am. Dec. 85; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Schenk v. Strong*, 4 N. J. 87; *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340; *Churchill v. White*, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64.

32—*Hall v. Corcoran*, 107 Mass. 251, 256, 9 Am. Rep. 30. See, on the general subject, *Tucker v. Moreland*, 10 Pet. 58.

33—WALWORTH, Chancellor, *Campbell v. Stakes*, 2 Wend. 137, 143-4, 19 Am. Dec. 561.

34—*Fish v. Ferris*, 5 Duer, 50. And, see, *Moore v. Eastman*, 1

Hun, 578; S. C. 4 N. Y. Sup. Ct. (T. & C.) 37; *Lewis v. Littlefield*, 15 Me. 235; 1 Pars. on Cont. 264. An infant hired a mare to ride. He was told she was not fit for leaping. He allowed a friend to take her, who undertook to leap over the fence, and she fell and was killed. BYLES, J.: "The rule is plain, both as to married women and infants, that you cannot by suing *ex delicto*, change the nature and extent of their liability. Here, however, the mare was let for the specific purpose of a ride along the road, and for the purpose of being ridden only by the defendant. The defendant not only allows his friend to mount, but allows him to put the mare to a fence, for which he was told she

this doctrine rests upon the fact that the plaintiff, who is allowed a choice of remedies in such cases has elected to pursue that which is in form *ex delicto*, instead of that which sounds in contract, it is manifest that it cannot be adopted as a general principle without taking from infants all legal protection in a large class of contracts. The doctrine has been sharply criticised in Pennsylvania, whose courts refuse to follow it,³⁵ adopting, as applicable to such cases, the language of Sir JAMES MANSFIELD, that "the form of *the action cannot alter the nature of the transac- [*126] tion," and that, "though the non-performance of that which is originally contract may be made the subject of an action of tort, the foundation of that action must still be in contract."³⁶

But the weight of authority putting out of view any question regarding the proper form of action would seem to be with the New York cases.³⁷

The question whether an infant is liable in tort for falsely

was unfit. * * The defendant is clearly responsible for the wrong done. * * To use the mare as he did was an act of tort, just as distinct from the contract as if the defendant had run a knife into her and killed her." *Burnard v. Haggis*, 14 C. B. (N. S.) 45, 53, 52.

35—*Wilt v. Welsh*, 6 Watts, 9. The ground of this action was, that the defendant, an infant, had hired a horse to go to one place, and had driven him to another and more distant place. Declaration in trover. GIBSON, Ch. J., reviews the New York and Massachusetts cases, and rejects them as unsound, holding the defendant not liable. *Penrose v. Curren*, 3 Rawle, 351, 24 Am. Dec. 356, was a similar case, except that there the horse was killed by hard usage. Says ROGERS, J.: "The foundation of the action is contract, and dis-

guise it as you may, it is an attempt to convert a suit originally in contract into a constructive tort, so as to charge the infant." Approved in *Livingston v. Cox*, 6 Penn. St. 360, 363. Compare *Root v. Stevenson's Admr.*, 24 Ind. 115, 120.

36—*Weall v. King*, 12 East, 452. And, see, *Studwell v. Shapter*, 54 N. Y. 249. Compare *Eaton v. Hill*, 50 N. H. 235, 240, 9 Am. Rep. 189. In this last case it is held that case will lie against an infant for a positive wrongful act to property bailed to him, and that it is not necessary, as was held in *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561, to bring trespass. See, also *Schenk v. Strong*, 4 N. J. 87.

37—See, besides the cases referred to in Maine and New Hampshire, *Story on Sales*, § 28; 1 Pars. on Cont. 316.

representing himself to be of full age, whereby he induces another to contract with him to his prejudice, is one upon which great differences of judicial opinion have been expressed. In England it is thoroughly established that he is not liable.³⁸ The English cases have often been approved in this country, and the tendency of authority here is with them.³⁹ But other cases hold the contrary.⁴⁰ In a case belonging to the former class the court

38—*Johnson v. Pye*, 1 Lev. 169; 1 Sid. 258, and 1 Keb. 905; *Price v. Hewett*, 8 Exch. 146; *Liverpool, etc., Association v. Fairhurst*, 9 Exch. 422; *Bartlett v. Wells*, 31 L. J. Q. 57; S. C. 1 B. & S. 836; *Wright v. Leonard*, 11 J. Scott (N. S.), 258; *De Roo v. Foster*, Ib. 272. Where, by false representations, a minor has obtained a lease of furnished premises the lessor is entitled to have the lease declared void and possession given him, but defendant cannot be held for use and occupation. *Lemprière v. Lange*, L. R. 12 Ch. D. 675.

39—*Brown v. Dunham*, 1 Root, 272; *Geer v. Hovey*, Ib. 179; *Wilt v. Welsh*, 6 Watts, 9; *Curtin v. Patton*, 11 S. & R. 309; *Stoolfodz v. Jenkins*, 12 S. & R. 403; *Livingston v. Cox*, 6 Pa. St. 360; *Kean v. Coleman*, 39 Pa. St. 299, 80 Am. Dec. 524; *Brown v. McCune*, 5 Sandf. (S. C.) 224; *Homer v. Thwing*, 3 Pick. 492; *Merriam v. Cunningham*, 11 Cush. 40; *Carpenter v. Carpenter*, 45 Ind. 142; *Burns v. Hill*, 19 Geo. 22; *Kilgore v. Jordan*, 17 Texas, 341; *Tucker v. Moreland*, 10 Pet. 59; *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 78 Am. St. Rep. 510, 49 L. R. A. 560; *New York B. L. B. Co. v. Fisher*, 23 App. Div. 363, 48 N. Y. S. 152; *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47, 15 Am. St. Rep. 931, 4 L. R. A. 561.

40—See *Ward v. Vance*, 1 N. & McCord, 197; *Peigne v. Sutcliffe*, 4 McCord, 387; *Fritz v. Hall*, 9 N. H. 441; *Norris v. Vance*, 3 Rich. 164; *Seabrook v. Gregg*, 2 S. C. (N. S.) 79. In *Fitz v. Hall*, supra, PARKER, Ch. J., undertakes to lay down a general rule as follows: "The principle," he says, "seems to be that, if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations, or concealment respecting the subject matter of it, the infant cannot be charged for this breach of his promise or contract by a change in the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful and positive wrong in itself, then, although it may be connected with a contract, the infant is liable. The representation in *Johnson v. Pye*, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an

says: "In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was

action of *assumpsit*. The matter arises purely *ex delicto*. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the lots, but that by no means makes it part and parcel of the contract. It was antecedent to the contract, and if an infant is liable for a positive wrong connected with a contract, but arising after a contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract."

This decision is pronounced by the editors of the American Leading Cases, in their notes to *Tucker v. Moreland*, Vol. I., to be "clearly unsound," and they say that "the representation, by itself, was not actionable, for it was not an injury, and the avoidance of the contract, which alone made it so, was the exercise of a perfect legal right on the part of the infant. The contract in such a case as *Fitz v. Hall* forms an essential part of the right of action, and no liability growing out of contract can be asserted against an infant. The test of an action against an infant is, whether a liability can be made out without taking notice of the contract." But Mr. Parsons, who approves the case, says the learned editors mistook the real ground of the decision in *Fitz v. Hall*, which was that a fraudulent representation, whereby money or goods are ob-

tained by an infant, is an actionable injury. 1 Pars. on Cont. 5th Ed. 318, note. See *Walker v. Davis*, 1 Gray, 506. The case was approved by REDFIELD, Ch. J., in *Towne v. Wiley*, 23 Vt. 359, 46 Am. Dec. 85, but denied to be sound in *Gibson v. Spear*, 38 Vt. 311, 315, in which it is said: "We think that the fair result of the American as well as of the English cases is that an infant is liable in an action *ex delicto* for an actual and wilful fraud only in cases in which the form of action does not suppose that a contract has existed; but that where the *gravamen* of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense." The principle thus stated would exclude many cases in which it is admitted an infant is liable. With deference it may be suggested whether, where a party has never intended to rely upon the contract of an infant, or to have any contract dealings at all with one, justice to him and "protection" to the infant does not require that the fraud shall be dealt with in like manner as would any other distinct tortious act. In *Eckstein v. Frank*, 1 Daly, 334, Judge DALY denies the soundness of *Johnson v. Pye*, and considers it overruled in *New York* by *Wallace v. Morss*, 5 Hill, 392. In *Indiana* in a late case it is held that an infant is liable in tort for the actual loss resulting from a false and fraudulent representa-

induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question."⁴¹

[*127] *The protection against personal responsibility which the law accords to an infant does not go so far as to vest in him the title to property which he has obtained by fraud, or on a contract which he disaffirms. If he still retains the property when the contract is disaffirmed, he must restore it on demand, and on his failure to do so, the original owner [*128] may obtain *it on replevin, or recover its value in an action of trover.⁴² And where the property was obtained by fraud the infant has been held liable, though the conversion took place before the time when the price was payable by the terms of the fraudulent contract.⁴³

As the doctrine *respondeat superior* rests upon the relation of master and servant, which depends upon contract, actual or implied, it is obvious that it can have no application in the case of an infant employer, and he, therefore, is not responsible for torts of negligence by those in his service.⁴⁴ Nor can he be made a trespasser by relation through the ratification of a wrongful

tion of his age where by reason of it a contract has been made with him. "Thus an equitable conclusion is reached and one in harmony with his liability in tort." *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53. All the cases agree that, if an infant is sued on his contract, his fraud will not preclude his relying upon his infancy in a defense in that suit. *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146; *Merriam v. Cunningham*, 11 Cush. 40; *Brown v. McCune*, 5 Sandf. (S. C.) 244; *Studwell v. Shafter*, 54 N. Y. 249. There are statutes in some States rendering infants responsible for

their false assertions of majority. See *Schouler*, Dom. Rel. 570; *Ewell's Lead. Cas.* 205, 206.

41—*Slayton v. Barry*, 175 Mass. 513, 575, 56 N. E. 574, 78 Am. St. Rep. 510, 49 L. R. A. 560.

42—*Mills v. Graham*, 1 New Rep. 140; *Badger v. Phinney*, 15 Mass. 359, 18 Am. Dec. 105; *Walker v. Davis*, 1 Gray, 506; *Kilgore v. Johnson*, 17 Texas, 341; *Ashlock v. Vivell*, 29 Ill. App. 388; *Pars. on Cont.* 5th Ed. 319; *Reeve Dom. Rel.* 244; *Schouler*, Dom. Rel. 555.

43—*Walker v. Davis*, 1 Gray, 506; *Schouler*, Dom. Rel. 555-6.

44—*Robbins v. Mount*, 4 Robt. 553; S. C. 33 How. Pr. 34.

act which another has assumed to do on his behalf, but without his knowledge.⁴⁵

It seems that if an infant tortiously convert the money of another to his own use, or tortiously dispose of the property of another, receiving money therefor, the tort may be waived and assumpsit maintained.⁴⁶ The reasons for this are well set forth in a Vermont case.⁴⁷

45—Burnham v. Seaverns, 101 Mass. 260, 100 Am. Dec. 123. See Armitage v. Widoe, 36 Mich. 124. Nor is he liable as innkeeper upon the custom of the realm. Cross v. Andrews, Carth. 161; Cro. Eliz. 622.

46—Bristow v. Eastman, 1 Esp. 172; Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290. See Peigne v. Sutcliffe, 4 McCord, 387; Munger v. Hess, 28 Barb. 75.

47—Elwell v. Martin, 32 Vt. 217, ALDIS, J.: "The defendant, a minor, tortiously, and without the knowledge or consent of the plaintiff, took from him one hundred and ninety dollars in money: is he liable therefor in assumpsit for money had and received? It is admitted that if he were an adult he would be so liable. Where property has been tortiously taken and converted into money, the plaintiff may sue in tort, or he may waive the tort and sue in assumpsit. When it is said that he waives the tort, it is not meant that he does any act or makes any averment in his declaration to that effect. He simply brings assumpsit instead of trespass or trover, and thereby foregoes the advantage he would have if he sued tortwise to claim higher or exemplary damages, and to proceed against the person of the defendant. By bringing assumpsit he pursues a remedy milder and

more favorable to the defendant. The defendant cannot be worse and may be better off by being sued *ex contractu*. Such is the law as applicable to adults.

"It is also admitted that the defendant is liable for the tort, and that the damages recoverable in an action *ex delicto* cannot be less than the money tortiously taken, which would be the measure of damages in assumpsit. But it is claimed that although infancy is no bar to the cause of action in tort, although the infant is fully liable for the tort, still if the plaintiff elects to sue in assumpsit, then the infant, on account of the form of action, can plead his infancy in bar of the suit.

"The plea of infancy is allowed to protect the infant from imposition, to shield him against the consequences of his inexperience and ignorance. Hence, his express promises do not bind him. Even for necessities, which he must have, or otherwise he would starve, he is not liable by virtue of any express promise; for if he promise to pay an unreasonable price for them, he is not bound by such promise but only to pay a reasonable price which is *implied*.

"As infancy does not protect him from the consequences of and liability for his tortious acts, why should it furnish him with de-

[*129] *It has been decided in Illinois, that if an infant makes a purchase for cash, and pretends to make payment
 [*130] *by delivery of a check on a bank where he has no funds,

fense against them when sued *ex contractu* instead of *ex delicto*? The right to elect the form of action belongs to the plaintiff. The infant cannot be injured, but may be benefited by being sued in *assumpsit*. Why may not an infant be allowed to have a milder remedy brought against him as well as adult tort feasers?

"The promise upon which he is made liable is not an express one. The law implies it from the wrongful act. It is not a contract in which he may have been cheated, and against which infancy shields him, but a wilful wrong which he has committed against another, and in which the law implies the obligation to make the restitution. Here the necessity is to protect, not the infant, but society. The plea should cease when the reason for it ceases. Although the action is *assumpsit*, yet the substance is in tort, and when the substance has been made to appear by proof, we see no reason why the form of action which is favorable to the infant may not be maintained. In the substance of the proceedings there is no anomaly and none as to the form which is not fully answered by allowing such suits to stand against adults.

"The action, we think, is fully sustained by authority. *Bristow v. Eastman*, reported in 1 Esp. 172, and in *Peake*, 223, is an authority to show that an infant who has embezzled money may be sued for it in *assumpsit*.

"As reported in *Espinasse*, it is a direct decision on the point. In

Peake it is said that the plaintiff proved that the defendant acknowledged the fraud and promised to pay after he came of age, so that the point was not determined. In this view it is but the doctrine of Lord Kenyon. We notice, however, that the case is more fully reported in *Espinasse*, and seems to bear upon its face the marks of greater accuracy and a more thorough knowledge of the case.

"The doctrine there held by Lord Kenyon, that an infant is liable in *assumpsit* for money he has embezzled, has been recognized and adopted by several elementary writers on the subject of infancy; by Judge Reeve, in his *Domestic Relations*, 246: by Prof. Greenleaf, 2 *Greenleaf's Ev. Sec.* 368, and by Story on Contracts, p. 64. It is questioned upon what seems to us insufficient ground in an article in the *American Jurist*, January, 1839. See, also, *Bing. on Infancy*, p. 111, and 1 *Am. Leading Cases*, 261.

"The defendant has cited several cases to show that to sue in *assumpsit* the plaintiff must waive the tort, and that then the case must proceed as if the money was received without wrong, and the defendant only liable for a breach of contract. Such is, unquestionably, the theory of the law, and the principle is recognized in the cases cited. *Conant v. Raymond*, 2 Aik. 243; *Fisher v. Jail Commissioners*, 3 Vt. 328; *Young v. Marshall & Poland*, 21 E. C. L. 437 (8 *Bing.* 43).

[*131] *the title to the property does not pass, and its value may be recovered in trover.⁴⁸

"But this does not settle the question here at issue, whether an infant tortiously taking money can plead infancy in bar when sued in assumpsit, for the validity of a plea as a defense may, and ordinarily should turn, not upon the form of the action, but its substantial merit. Indeed, the language of Ch. J. Tindall, in the case last cited, shows upon what grounds and why a party may waive the tort, and the reasons assigned show that it may as well be waived in the case of an infant as of an adult. He speaks of it as a general rule, that 'no party is bound to sue in tort, where, by converting the action into an action of contract, *he does not prejudice the defendant*, and generally speaking, it is more favorable to the defendant to be sued in contract.'

"In the same case, Bosanquet and Alderson, Judges, say that by waiving the tort the plaintiff does not affirm the wrongful acts of the defendant, but merely waives his claim to damages for the wrong, and is content to sue for the proceeds of the wrongful act.

"Our attention has been called to the principle generally recognized and established in this State in *West v. Moore*, 14 Vt. 449, 39 Am. Dec. 231, that where the liability really arises by breach of a contract, though accompanied by fraud or tort, the plaintiff shall not be allowed to change the form of action and hold the infant liable *ex delicto* for the tort. The reason of the decisions stands upon the plain ground of protecting the infant against his liabili-

ties really arising upon contract. In tort the infant might be liable for greater damages than upon contract, and when the substantive cause of action is upon a contract, he ought not to be liable at all. The cases under this head are numerous. Sometimes it is difficult to tell which most preponderates, the contract or the tort, and the rule which has been sometimes applied as a tort, that the conversion must be wilful, and not constructive by breach of the contract, seems just in theory, though very difficult in practical application. See the cases on this point collected in 1 Am. Lead. Cases, 260, *et seq.*

"But it by no means follows that because an infant may not be made liable for his contracts by changing the form of action to tort, that he shall not therefore be made liable *ex contractu*, where he is in fact liable for his wrongful acts, and the law implies from them in all other cases the promise and the duty of making restitution. To extend to an infant the privilege of defeating his legal liability by setting up his infancy as a defense, not to the cause of action, but to the form in which it is declared upon, would not, we think, be a reasonable conclusion from the acknowledged principles upon which the privilege of infancy is granted to him, and is not required by any of the rules regulating the forms of action. On the contrary, it would convert the shield into a sword."

48—*Mathews v. Cowan*, 59 Ill. 341.

Torts by Drunkards. The fact that a tort was committed while a defendant was intoxicated is no excuse whatever. This has been held in actions for slander.⁴⁹ It is conceivable, however, that the amount of the recovery might be considerably affected by a showing that the wrong was committed under such conditions that no one would have been likely to attach importance to the utterances.

Torts Committed Under Duress. In general, one cannot excuse a tort by showing that he committed it under duress. In Tennessee, however, it has been decided that it is a good defense to show that a tort was committed under the orders of the defendant's military superior, which at the time he was compelled to obey.⁵⁰

Torts of Married Women. Where husband and wife jointly commit a wrong, the action therefor is properly brought against the husband alone, for the whole may be assumed to be [*132] his act.⁵¹ *But "as a general rule, a married woman is answerable for her wrongful acts, including frauds, and she may be sued in respect of such acts jointly with her husband, or separately if she survives him. The liability is hers; though living with the husband, it must be enforced in an action against her and him, which, to charge him, must be brought to a conclusion during their joint lives."⁵² If she survives him, the

49—*St. Ores v. McGlashen*, 74 Cal. 148, 15 Pac. 452; *McKee v. Ingalls*, 5 Ill. 30; *Reed v. Harper*, 25 Iowa, 87, 95 Am. Dec. 774.

50—*McKeel v. Bass*, 5 Cold. 151; *Waller v. Parker*, 5 Cold. 476. In these cases the defendants were soldiers in the confederate army, and might, perhaps, have justified under the rules of war. Compare *Mitchell v. Harmony*, 13 How. 115. See *Buron v. Denman*, 2 Exch. 167, in which the trespass of the defendant in breaking up the barracoen of the plaintiff on the coast of Africa, and freeing his slaves, was held justified by the subse-

quent ratification of the act by the government, this being equivalent to a prior command.

51—*Com. Dig. Baron & Feme. V.*; 2 Saund. Pl. & Ev. 192; *McKeown v. Johnson*, 1 McCord, 578, 10 Am. Dec. 698; *Cassin v. Delany*, 38 N. Y. 178; *Crow v. Manning*, 45 La. Ann. 1221, 14 So. 122. The wife should not be made defendant in an action for the wrongful joint possession of a chattel by her and her husband. *Longey v. Leach*, 57 Vt. 377.

52—WILLES, J., in *Wright v. Leonard*, 11 C. B. (N. S.) 258, 266. And see *Strouse v. Leiff*, 101 Ala.

suit may proceed against her separately.⁵³ There is a presumption, however, corresponding to that which is made in the criminal law, that if a wrong is committed by the wife, in the presence of her husband, it must have been committed by his consent and under his influence, and, consequently, is his wrong rather than that of the wife, and should be redressed in a suit against him alone.⁵⁴ But any such presumption is liable to be overthrown by evidence.⁵⁵ "The true view is," says Mr. Bishop,⁵⁶ "that when the husband is present during the commission of a tort by the wife, whether himself actually participating in it or not, *prima facie* the wrong shall be deemed his alone; but both in civil and criminal causes, this *prima facie* case may be rebutted, and

433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622; *Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21, 92 Am. St. Rep. 160; *Bruce v. Bombeck*, 79 Mo. App. 231; *Fitzgerald v. Quam*, 109 N. Y. 441, 17 N. E. 354; *Presnell v. Moore*, 120 N. C. 390, 27 S. E. 27; *Ridgway v. Spielman*, 20 Pa. Co. Ct. 596; *Crawford v. Doggett*, 82 Tex. 139, 17 S. W. 929, 27 Am. St. Rep. 859.

53—*Capel v. Powell*, 17 C. B. (N. s.) 744; *Smith v. Taylor*, 11 Geo. 20, 22; *Estill v. Fort*, 2 Dana, 237; *Hawk v. Harman*, 5 Binn. 43.

54—*Ball v. Bennett*, 21 Ind. 427, 83 Am. Dec. 356; *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149; *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772; *Quick v. Miller*, 103 Pa. St. 67; *Kosminsky v. Goldberg*, 44 Ark. 401; *Smith v. Schoene*, 67 Mo. App. 604; *Hess v. Heft*, 3 Pa. Supr. Ct. 582; *Henderson v. Wendler*, 39 S. C. 555, 17 S. E. 851; *Edwards v. Wessinger*, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789. To justify the exemption of the wife from liability, the presence and command of the husband must con-

cur. An offense by his direction but not in his presence, or in his presence but not by his direction is not within the rule which gives immunity to her. *Hildreth v. Camp*, 41 N. J. L. 306. On the other hand it is held in Ohio that the husband need not be present when the wife acts or know that the act was contemplated or that it has been committed. *Holz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791. And in Arkansas, in a case where the husband was held for slander spoken in his presence the law is similarly laid down. *Kosminsky v. Goldberg*, 44 Ark. 401. The husband is liable for his wife's slander. If uttered in his presence he alone should be made a party; if not, they should be sued jointly. *Quick v. Miller*, 103 Pa. St. 67.

55—*Smith v. Schoene*, 67 Mo. App. 604; *Edwards v. Wessinger*, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789; *Miller v. Sweitzer*, 22 Mich. 391; *Cassin v. Delaney*, 38 N. Y. 178.

56—*Law of Married Women*, Vol. 2, § 258.

each of the two may be deemed, in law, the doer of the wrong, the same as though they were unmarried.⁵⁷ Therefore, if [*133] husband and wife join in a malicious prosecution, she being really an active party as well as he, she may be joined with him as defendant in an action to recover damages for it, though she performed no act in which he was not present concurring.⁵⁸ And it is the same where they join in a battery.⁵⁹ If the wife is the active party in a tort, the declaration will either count upon the tort as that of the wife alone, or as that of both husband and wife,⁶⁰ though, if the case be in trover, the conversion must be averred to be for the use of the husband.⁶¹ This was the common law rule; but where, by statute, the wife retains and acquires real and personal estate the same as a *femme sole*, no reason is perceived why she might not be charged with a conversion to her own use.⁶²

A wife was held not liable for injuries by her husband's dog

57—Citing *Marshall v. Oakes*, 51 Me. 308; *Warner v. Moran*, 60 Me. 227; *The State v. Cleaves*, 59 Me. 298, 8 Am. Rep. 422; *Carleton v. Haywood*, 49 N. H. 314; *Simmons v. Brown*, 5 R. I. 299; *Tobey v. Smith*, 15 Gray, 535. The husband and wife may be held jointly liable for a tort committed by her in his absence, if it is done at his instigation. *Handy v. Foley*, 121 Mass. 259, 23 Am. Rep. 270.

58—Referring to *Cassin v. Delaney*, 38 N. Y. 178. See, also, *Simmons v. Brown*, 5 R. I. 299, and cases cited.

59—Citing *Roadcap v. Sipe*, 6 Grat. 213, and *Drury v. Dennis*, Yelv. 106. See, also, *Yeates v. Reed*, 4 Blackf. 463, 32 Am. Dec. 43; *Estill v. Fort*, 2 Dana, 237; *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149; *Keyworth v. Hill*, 3 B. & A. 685; *Vine v. Saunders*, 4 Bing. (N. C.) 96.

60—*Bishop, Law of Married Women*, Vol. 2, § 259.

61—*Estill v. Fort*, 2 Dana, 237; *Tobey v. Smith*, 15 Gray, 535; *Kowling v. Manly*, 49 N. Y. 192, 198; *Shaw v. Hallihan*, 46 Vt. 389, 14 Am. Rep. 628. Compare *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366.

62—See *Hagebush v. Ragland*, 78 Ill. 40. "A *femme covert* is liable for fraud committed by her in dealing with her separate property, or by her husband, as her agent, to the same extent as individuals in all respects capable of acting *sui juris*. *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577. This liability necessarily results from the capacity conferred on her to acquire, hold and transfer property, and to deal with her separate estate, as if she were unmarried." ALLEN, J., in *Vanneman v. Powers*, 56 N. Y. 39, 42.

which he kept, without her consent, upon her premises where they both lived.⁶³ But where she knowingly permitted the dog to be so kept and knew of its vicious propensities she was held liable.⁶⁴ Where the wife owned and kept a dog known to be vicious upon premises owned by her and where she and her husband resided, and the dog escaped and injured the plaintiff, it was held that the husband alone was liable, as he was the head of the family and controlled the premises.⁶⁵ Where the wife owns a hotel where she and her husband live and which they carry on together, she is not liable for an assault by him, on the ground that he is her servant, or otherwise.⁶⁶

While the husband is liable for the torts committed by the wife,⁶⁷ this liability only continues during coverture and cannot be enforced after a divorce is granted⁶⁸ nor against his estate after his death.⁶⁹ Nor is the husband liable for a tort committed by his wife before marriage and while she was the wife of another man.⁷⁰

But the element of contract is as important here as in the law of infancy. The same reasons which would preclude the indirect redress of the infant's breach of contract, by treating it as a tort, will preclude the like redress in the case of the contract of a married woman.⁷¹ And here, also, we encounter the same diffi-

63—*McLaughlin v. Kemp*, 152 Mass. 7, 25 N. E. 18.

64—*Quiltie v. Battie*, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521.

65—*Strouse v. Leiff*, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622.

66—*Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148.

67—*Henly v. Wilson*, 137 Cal. 273, 70 Pac. 21, 92 Am. St. Rep. 160; *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; *Taylor v. Pullen*, 152 Mo. 434, 53 S. W. 1086; *Bruce v. Bombeck*, 79 Mo. App. 231; *Fitzgerald v. Quam*, 109 N. Y. 441, 17 N. E. 354; *Mangam v. Peck*, 111 N. Y.

401, 18 N. E. 617; *Preswell v. Moore*, 120 N. C. 390, 27 S. E. 27; *Ridgeway v. Speilman*, 20 Pa. Co. Ct. 596; *Henderson v. Wendler*, 39 S. C. 555, 17 S. E. 851.

68—*Capel v. Powell*, 17 C. B. (N. s.) 743.

69—*Id.*; *Wright v. Leonard*, 11 C. B. (N. s.) 258; *Smith v. Taylor*, 11 Ga. 20; *Estill v. Fort*, 2 Dana, 237; *Kosminsky v. Goldberg*, 44 Ark. 401.

70—*Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713.

71—See *Burnard v. Haggis*, 14 C. B. (N. s.) 45.

cultics when we undertake to draw the line of distinction between cases which are really in their substance, cases of contract, though a wrong may be involved, and cases in which a wrong [*134] stands apart from the contract. The *English cases, which hold, as we have seen, that an infant cannot be made liable as for a tort for falsely affirming that he is of age, and thereby effecting a contract, are supported in their principle by others, which affirm that the wife may rely upon her coverture as a defense to contracts obtained by her on a false assertion that she was unmarried.⁷²

There is reasoning in some of these cases which does not appear entirely satisfactory; for it assumes that if an action might be supported for the breach of such a contract, "the wife would lose the protection which the law gives her against contracts made by her during coverture. * * For every such contract would involve in itself a fraudulent representation of her capacity."⁷³ But we can hardly agree that the making of a contract involves an assertion of competency to make a lawful contract. Such a doctrine would make every contract by an infant involve a false assertion of majority, which is far from being the common understanding. It seems much more reasonable to act on a supposition that every person satisfies himself whether those with whom he deals are competent to contract; and if he makes no inquiry when dealing with one under disability, the sensible conclusion is that he relies upon honor and integrity rather than upon legal responsibility. It is quite certain that no one understands, when a purchase is made on credit, that there is any implied assertion by the buyer that he has property sufficient to make good his promise to pay. The seller is supposed to have informed himself on that point, and to consent to run the risk. But when the

72—See *Cooper v. Witham*, 1 Lev. 247; 1 Sid. 375; 2 Keb. 399, in which the contract effected by means of the fraud was a contract of marriage. Husband and wife are not liable for the fraud of the wife in the purchase by her of goods on a false assertion that

she and her children were in destitute circumstances. *Woodward v. Barnes*, 46 Vt. 332, 14 Am. Rep. 626.

73—Pollock, C. B., in *Adelphi Loan Ass'n v. Fairhurst*, 9 Exch. 422. See, also, *Wright v. Leonard*, 11 C. B. (N. S.) 256.

seller refuses to deal, except after assurance of legal responsibility, this is an express refusal to assume the risk, and the doctrine that he nevertheless shall do so seems to us as questionable in logic, as it certainly is in morals. But the authorities are as above stated.⁷⁴

In the recent changes in the common law effected by statute *in the several States, whereby married women [*135] have been given an independent power to make contracts and to control property, it is not very clear how far the law of torts has been modified. We should probably be safe in saying that so far as they give validity to a married woman's contracts, they put her on the same footing with other persons, and when a failure to perform a duty under a contract is in itself a tort, it may doubtless be treated as such in a suit against a married woman. The same would probably be true of any breach of a duty imposed upon a married woman as owner of property which she possesses and controls the same as if sole and unmarried. In a case of this sort the Supreme Court of Indiana says: "Where the wrong relates to the use or management of their separate estates, as in this case, the torts of married women, committed by the violation of any duty imposed upon them by law with respect to such estates, create the same liability against them as if they were unmarried. And this would be so without regard to the statute above referred to, under the *maxim sic utero*, etc. Having been relieved of their disabilities and empowered to own and control separate estates as *femmes sole*, they take the right with all its incidents, and must, therefore, like all other persons, use their property with due regard for the rights of others."⁷⁵ In Illinois

74—In *Keen v. Coleman*, 39 Penn. St. 299, 80 Am. Dec. 524, a married woman had obtained property on a false assertion that she was a widow, giving her obligations therefor. When proceedings were taken to enforce these, she relied upon her coverture. LOWRIE, Ch. J.: "She may be liable to an action for the deceit practiced by her, but she had no

legal power to execute this bond, and she cannot be legally bound.

* * If a legal incapacity can be removed by a fraudulent representation of capacity, then the legal incapacity would have only a moral bond or force, which is absurd."

75—*Mayhew v. Burns*, 103 Ind. 328, 337, 2 N. E. 793.

it has been decided that under the new statutes the husband is not liable for a slander of the wife in which he did not participate, though the statutes on the subject, which were supposed to have changed the common law, were silent as regards her torts, and only purported to secure to the woman her property and earnings and the full control and enjoyment thereof.⁷⁶ This is, perhaps, a sound conclusion. Certainly the reasons on which the new legislation proceeds are such as should leave the wife to respond alone for her torts, for they assume that she is fully capable of controlling her own actions, and can and will act independently of her husband.⁷⁷

[*136] ***Torts by Corporations.** Corporations are responsible for the wrongs committed or authorized by them, under substantially the same rules which govern the responsibility of

76—*Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578. See *Chicago, etc., R. R. Co. v. Dickson*, 77 Ill. 331; *Radke v. Schlundt*, 30 Ind. App. 213, 65 N. E. 770; *Golibart v. Sullivan*, 30 Ind. App. 428, 66 N. E. 188; *Bethel v. Otis*, 92 Ia. 502, 61 N. W. 200; *Lane v. Bryant*, 100 Ky. 138, 37 S. W. 584, 36 L. R. A. 709; *McClure v. McMartin*, 104 La. Ann. 496, 29 So. 227; *Marcus v. Rovinsky*, 95 Me. 106, 49 Atl. 420; *Fitzgerald v. Quam*, 109 N. Y. 441, 17 N. E. 354; *Story v. Downey*, 62 Vt. 243, 20 Atl. 321. A similar rule is laid down in *Kansas. Norris v. Cor-kill*, 32 Kan. 409, 49 Am. Rep. 489. So in *Michigan*, unless her act is in some way connected with the husband's authority or owing to his fault. *Ricci v. Mueller*, 41 Mich. 214. In *Pennsylvania* the husband, under the act of 1887, is not liable for the wife's individual tort. *Kuklence v. Vocht*, 13 Atl. Rep. 198. In *Missouri* the husband is jointly liable. *Merrill v. St. Louis*, 12 Mo. App. 466. In

Maine she may be liable for her husband's tort committed as her agent in enforcing some supposed right affecting her property. *Ferguson v. Brooks*, 67 Me. 251.

But in *Ohio* and *Indiana* it is held that the modern statutes do not change the common law rule. *Holz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Choen v. Porter*, 66 Ind. 194.

77—In *Illinois*, *Michigan*, and *Iowa*, the statutes relative to the rights of married women have been held to entitle the wife to recover for her own use the damages suffered from a personal tort. *Chicago, etc., R. R. Co. v. Dunn*, 52 Ill. 260; *Hennies v. Vogel*, 66 Ill. 401; *Chicago, etc., R. R. Co. v. Dickson*, 67 Ill. 122; *Berger v. Jacobs*, 21 Mich. 215; *Musselman v. Galligher*, 32 Iowa, 383; *Pan-coast v. Burnell*, Id. 394; *Mewhirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618. In *New York* it is held that the wife's time in the household still belongs to the husband, and therefore he should sue for

natural persons.⁷⁸ It was formerly supposed that those torts which involved the element of evil intent, such as batteries, libels, and the like, could not be committed by corporations, inasmuch as the State, in granting rights for lawful purposes, had conferred no power to commit unlawful acts; and such torts, committed by corporate agents, must consequently be *ultra vires*, and the individual wrongs of the agents themselves. But this idea no longer obtains.⁷⁹ It is true, as a rule, that as the corporation is created for a particular purpose only, and endowed with powers to accomplish that purpose, nothing can be done by it or in its name that is not within the intent of its charter. It must indeed act through agents and officers; but if these undertake to do what the corporation is not empowered to do, their action cannot impose a liability upon the corporation. An apt illustration is the case of fraudulent representations made by an officer of a national bank in the sale of railroad bonds on commission. As the bank has no power to make such sales, the fraud is the individual

an injury which disables her from performing household duties. *Brooks v. Schwerin*, 54 N. Y. 343. And perhaps it would be held in any of the States that the husband might still sue for the consequential injury to himself. See *Mewhirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618.

78—*Waters v. West Chicago St. R. R. Co.*, 101 Ill. App. 265; *Fogg v. Boston, etc., R. R. Co.*, 148 Mass. 513, 20 N. E. 109; *Clifford v. Press Pub. Co.*, 78 App. Div. 79, 79 N. Y. S. 767; *West Virginia Trans. Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804. "Corporations are responsible civilly, the same as natural persons, for wrongs committed by their officers, servants or agents, or which are authorized or subsequently ratified." *Southern Car*

& F. Co. *v. Adams*, 131 Ala. 147, 159, 32 So. 503.

79—"The doctrine which was formerly sometimes asserted that an action will not lie against a corporation for a tort is exploded. The same rule in that respect now applies to corporations as individuals. They are equally responsible for injuries done in the course of their business by their servants." *Field, J. Baltimore, etc., R. R. Co. v. Fifth Bapt. Church*, 108 U. S., 317, 330. A cemetery association not organized for profit is liable in tort. *Donnelly v. Boston, etc., Ass.*, 146 Mass. 163, 15 N. E. 505. But a corporation for charitable purposes is not liable for an assault by one of its officers upon an inmate. *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495. See *Benton v. Trustees of Boston City Hosp.*, 140 Mass. 13, 54 Am. Rep. 436.

wrong of the officer.⁸⁰ But many torts are unintentional, [*137] and *arise through neglect of agents and servants, while others, though intentional, are committed by agents or servants in the supposed interest of their employers, and under circumstances which may justify them in believing that what they do is fairly authorized, and a part of their duty under their employment. To deny redress against the corporation would in many cases be a denial of all remedy. The rule is now well settled that, while keeping within the apparent scope of corporate powers, corporations have a general capacity to render themselves liable for torts, except for those where the tort consists in the breach of some duty which from its nature could not be imposed upon or discharged by a corporation. The rule of liability embraces not only the negligences and omissions of its officers and agents who are put in charge of or employed in the corporate business, but also all tortious acts which have been authorized by the corporation, or which are done in pursuance of any general or special authority to act in its behalf on the subject to which

80—Weckler v. First Nat'l Bank, 42 Md. 581, 20 Am. Rep. 25. The general rule that a corporation is not liable for such wrongs by its agents as are beyond the scope of corporate authority, is recognized in Poulton v. Railway Co., L. R. 2 Q. B. 534; Edwards v. Railway Co., L. R. 5 C. P. 445; Walker v. S. E. Railway Co., 5 C. P. 640; Allen v. Railway Co., L. R. 6 Q. B. 65; Coleman v. Riches, 16 C. B. 104; Udell v. Atherton, 7 H. & N. 172, 181; Isaacs v. Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; Ill. Cent. R. R. Co. v. Downey, 18 Ill. 259; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Miller v. Burlington, etc., R. R. Co., 8 Neb. 219. But, if the corporation assumes to do unauthorized acts in the course of which a tort is com-

mitted, it is liable. So, if a bank, with the knowledge and acquiescence of its directors, is accustomed to take special deposits not authorized by its charter, it is liable for the loss of such a deposit through gross carelessness. "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application." * * * "An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers." Nat. Bank v. Graham, 100 U. S. 699. Generally it may be said that a corporation is liable for the consequences of tortious acts done by its authority, though not within the scope of its powers, express, implied or inci-

they relate, or which the corporation has subsequently ratified.⁸¹ And in deciding upon this liability the disposition of the courts has *been to consider corporate officers, agents [*138] and servants as possessing a large and liberal discretion, and to hold the corporation liable for all their acts within the most extensive range of the corporate powers.⁸² This is just to

dental. *Central R. R., etc., Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353. See *South, etc., R. R. Co. v. Chappell*, 61 Ala. 527; *Alexander v. Relfe*, 74 Mo. 495; *New York, etc., R. R. Co. v. Haring*, 47 N. J. L. 137, 54 Am. Rep. 123.

81—*Mayor, etc., of Lyme Regis v. Henley*, 1 Bing. (N. C.), 222, 240; *Smith v. Birmingham Gas Co.*, 1 Ad. & El. 526; *Maund v. Monmouthshire Co.*, 4 M. & G. 452; *Eastern R. R. Co. v. Broom*, 6 Ex. 314; *Goff v. Great Nor. R. R. Co.*, 3 El. & El. 672; *Philadelphia, etc., R. R. Co. v. Quigley*, 21 How. 202; *Thayer v. Boston*, 19 Pick. 511; *Monument Nat'l Bk. v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Brokaw v. New Jersey, etc., R. R. Co.*, 32 N. J. 328; *Lynch v. Metr. El. Ry. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; *Payne v. R. R. Co.*, 13 Lea, 507; *Southern Car & F. Co. v. Adams*, 131 Ala. 147, 32 So. 503; *West Fla. Land Co. v. Studebaker*, 37 Fla. 28, 19 So. 176; *Central of Ga. Ry. Co. v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; *Noblesville Gas & Imp. Co. v. Loeher*, 124 Ind. 79, 24 N. E. 579; *Walker v. Culman*, 9 Kan. App. 691, 59 Pac. 606; *Baltimore, etc., Turnpike Road v. Green*, 86 Md. 161, 37 Atl. 642; *Grand Fountain Order v. Murray*, 88 Md. 422, 41 Atl. 896; *Peterson v. Western*

Union Tel. Co., 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; *Fitzgerald v. Fitzgerald, etc., Co.*, 41 Neb. 374, 59 N. W. 838; *Fitzgerald v. Fitzgerald, etc., Co.*, 44 Neb. 463, 62 N. W. 899; *Hoboken Print. & Pub. Co. v. Kahn*, 59 N. J. L. 218, 35 Atl. 1053, 59 Am. St. Rep. 585; *Lorick v. Atlantic Coast Line R. R. Co.*, 129 N. C. 427, 40 S. E. 191; *Dunn v. Agricultural Soc.*, 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754; *Selinas v. Vt. State Agricultural Soc.*, 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114. "To fix the liability, it must either appear that the officers were expressly authorized to do the act, or that it was done *bona fide*, in pursuance of a general authority, in relation to the subject of it, or that the act was adopted or ratified by the corporation." *Central Ry. Co. v. Brewer*, 78 Md. 394, 401, 28 Atl. 615, 27 L. R. A. 63. So whether the corporation received any benefit from the act or not. *Kansas Lumber Co. v. Central Bank*, 34 Kan. 635. So though the particular act was wilful and not directly authorized or even against instructions. *Penn., etc., Co. v. Weddle*, 100 Ind. 138; *Evansville, etc., Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102; *Terre Haute, etc., Co. v. Jackson*, 81 Ind. 19.

82—*Redf. on Railways*, 3d ed. 510, citing *Phil. & Read. R. R. Co.*

the public, and it is not unreasonable when regarded from the standpoint of the corporation, but will tend to insure greater care and caution in the selection of those who are to be entrusted with corporate affairs. Of course a corporation is not liable for acts of its officers and agents not within their express or implied authority.⁸³ The fact that one corporation owns all the stock of another does not make it liable for the latter's negligence or other torts.⁸⁴ Officers and stockholders are not liable for the torts of the corporation merely because they are such officers or stockholders.⁸⁵ In Illinois a corporation was held liable for the negligence of the servants of a receiver of the corporation, where the property had been returned to the corporation and the receiver discharged.⁸⁶

A corporation is liable for an assault and battery, when its agent in committing it was performing some act within the limits of his authority, but wrongfully or with excessive force.⁸⁷ So

v. Derby, 14 How. 468, 483; *Noyes v. Rutland & Burlington R. R. Co.*, 27 Vt. 110. See *Hutchinson v. Western, etc., R. R. Co.*, 6 Heisk. 634; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116.

83—*Noblesville Gas & Imp. Co. v. Loehn*, 124 Ind. 79, 24 N. E. 579; *Baltimore, etc., Turnpike Road v. Green*, 86 Md. 161, 37 Atl. 642; *Grand Fountain Order v. Murray*, 88 Md. 422, 41 Atl. 896.

84—*Louisville Gas Co. v. Kaufman*, 105 Ky. 131, 48 S. W. 434.

85—*Pfister v. Sentinel Co.*, 108 Wis. 572, 84 N. W. 887.

86—*Bartlett v. Cicero L. H. & R. Co.*, 177 Ill. 68, 52 N. E. 339, 69 Am. St. Rep. 206, 47 L. R. A. 715. See *Lock v. Turnpike Co.*, 100 Tenn. 163, 47 S. W. 133; 5 Thomp. Corp. § 7151.

87—*Monument Bank v. Globe Works*, 101 Mass. 57; *Ramsden v. Boston, etc., R. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200; *Brokaw v. New Jersey, etc., R. R. Co.*, 32 N.

J. 328; *Atlantic, etc., R. R. Co. v. Dunn*, 19 Ohio (N. S.) 162; *Passenger R. R. Co. v. Young*, 21 Ohio (N. S.) 518, 8 Am. Rep. 78; *Baltimore, etc., R. R. Co. v. Blocher*, 27 Md. 277; *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Hanson v. European, etc., R. R. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Higgins v. Watervliet T. & R. Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *St. Louis, etc., R. R. Co. v. Dalby*, 19 Ill. 353; *Eastern Counties R. R. v. Broom*, 6 Exch. 314; *Frost v. Domestic, etc., Co.*, 133 Mass. 563; *Denver, etc., Co. v. Harris*, 122 U. S. 597; *Central of Ga. Ry. Co. v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; *Missouri, etc., Ry. Co. v. Warner*, 19 Tex. Civ. App. 463, 49 S. W. 254; *Texas, etc., Ry. Co. v. Williams*, 62 Fed. 440, 10 C. A. 463.

a corporation may be guilty of a libel and held liable therefor.⁸⁸ "To establish its liability, the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the course of the business in which he was employed."⁸⁹

The rule is illustrated by the case of an official report of the corporation, made through its board of direction, in which is embodied a libel on a business rival. Such a libel is a corporate wrong, because the report is a corporate act, and the directors were acting within the scope of their authority in making it. Had the board ordered the publication of any other paper in the supposed interest of the corporation, it would have been equally a corporate act, and a libel contained in it a corporate wrong.⁹⁰

88—*American Casualty Co. v. Lea*, 56 Ark. 539, 20 S. W. 416; *Howland v. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. 656; *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S. W. 668; *Clifford v. Press Pub. Co.*, 78 App. Div. 79, 79 N. Y. S. 767; *St. Louis, etc., Ry. Co. v. McArthur*, 31 Tex. Civ. App. 205, 72 S. W. 66; *Sun Life Ins. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692.

89—*Fogg v. Boston, etc., R. R. Co.*, 148 Mass. 513, 516, 20 N. E. 109, 12 Am. St. Rep. 583.

90—*Whitfield v. Southeastern R. R. Co.*, El. Bl. & El. 115, 121; *Philadelphia, etc., R. R. Co. v. Quigley*, 21 How. 202; *Maynard v. Fireman's, etc., Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Aldrich v. Press Printing Co.*, 9 Minn. 133, 86 Am. Dec. 84. Corporation liable for the publication of a libel by its agent with its authority.

Howe Mach. Co. v. Souder, 58 Ga. 64; *Evening Journal Co. v. McDermott*, 44 N. J. L. 430, 43 Am. Rep. 392; *Johnson v. St. Louis Dispatch Co.*, 2 Mo. App. 565; *Samuels v. Evening Mail Ass.*, 75 N. Y. 604; and for slander uttered against another's business, *Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun, 153. A joint stock company is likewise liable for libel. *Van Aernam v. McCune*, 32 Hun, 316, and in *Dom. Tel. Co. v. Silver*, 10 Can. S. C. R. 238, a telegraph company is held liable for its agent's sending a libelous dispatch which was printed in a newspaper where there was a contract by which the agent was to furnish news to the paper. So in *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; *Peterson v. Western Union Tel. Co.*, 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; *Peterson v. Western Union Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302. But

[*139] *If, on the other hand, some servant of the corporation, who supposed he might advance its interests by decrying the business of a rival, were to proceed to do so by communications in the daily press, it is plain that these, though having in view the same purpose which the publication by the official board was meant to accomplish, can in no sense be regarded as corporate acts. They have not the corporate authorization; they are not made within the apparent scope of the servant's duty; and the tort is consequently an individual tort purely and solely, and redress must be sought accordingly.⁹¹

The same reasons that sustain an action against a corporation for a libel would sustain one for a malicious prosecution; and though the courts of Missouri and Alabama at one time held that no such action would lie,⁹² they have receded from this position⁹³ and it is now generally held that such action can be sustained.⁹⁴ A corporation may also be liable for false

[*140] *imprisonment, under circumstances corresponding to those which would sustain an action for any other forcible

it has been held that a member of a mutual aid society cannot sue the association as a partnership for slandering him, he being so united with it that there could be no partnership tort which would not make him a joint tortfeasor. *Gilbert v. Crystal, etc., Lodge*, 80 Ga. 284, 4 S. E. 905. In such case the action should be against the individual wrongdoers. *Id.*

91—*Aetna Life Ins. Co. v. Paul*, 37 Ill. App. 439; *Henry v. Pittsburgh, etc., R. R. Co.*, 139 Pa. St. 289, 21 Atl. 157.

92—*Childs v. Bank of Missouri*, 17 Mo. 213; *Owsley v. Montgomery, etc., R. R. Co.*, 37 Ala. 560.

93—*Boogher v. Life Ass.*, 75 Mo., 319; *Iron Mt. Bank v. Merc. Bank*, 4 Mo. App. 505; *Jordan v. Ala., etc., R. R. Co.*, 74 Ala. 85, 49 Am. Rep. 800.

94—*Vance v. Erie R. R. Co.*, 32

N. J. 334; *Goodspeed v. East Had-dam Bank*, 22 Conn. 530, 58 Am. Dec. 439; *Copley v. Sewing Machine Co.*, 2 Woods, 494; *Fenton v. Sewing Machine Co.*, 9 Phil. (Penn.) 189; *Walker v. S. Eastern R. R. Co.*, L. R. 5 C. P. 640; *Edwards v. Midland Ry. Co.*, L. R. 6 Q. B. D. 287; *Williams v. Planters' Ins. Co.*, 57 Miss. 759, 34 Am. Rep. 494; *Morton v. Met. Life Ins. Co.*, 34 Hun, 366; *Penn., etc., Co. v. Weddle*, 100 Ind. 138; *Reed v. Home Savings Bank*, 130 Mass. 443; *Springfield E. & T. Co. v. Green*, 25 Ill. App. 106; *Hibbard, Spencer, Bartlett & Co. v. Ryan*, 46 Ill. App. 313; *Willard v. Holmes*, 142 N. Y. 492, 37 N. E. 480; *Schwartz v. Van Wie, etc., Co.*, 69 App. Div. 282, 74 N. Y. S. 747; *Gulf, etc., R. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743. In Maryland it is held

ble wrong.⁹⁵ But to hold a corporation liable for malicious prosecution or false imprisonment it is necessary to show authority or ratification. Clerks and agents are not presumed to have authority to institute such proceedings.⁹⁶

A corporation may also be liable for frauds. "Strictly speaking, a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must pre-

that the agent who caused the prosecution must have been expressly authorized so to do either in advance or by subsequent ratification in order to bind the corporation. *Carter v. Howe Machine Co.*, 51 Md. 290, 34 Am. Rep. 311. In *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290, 302, ERLE, C. J., says: "I take the whole tenor of the authorities to show that an action for a wrong does lie against a corporation, when the act of the corporation—the thing done—is within the purpose of the corporation; and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual."

95—*Goff v. Great Western R. R. Co.*, 3 El. & El. 672; *Roe v. Birkenhead*, etc., R. R. Co., 7 Exch. 36; *Frost v. Domestic*, etc., Co., 133 Mass. 563; *Am. Expr. Co. v. Patterson*, 73 Ind. 430; *Evansville*, etc., Co. v. *McKee*, 99 Ind. 519, 50 Am. Rep. 102; *Carter v. Howe Machine Co.*, 51 Md. 290, 34 Am.

Rep. 311; *Wheeler*, etc., Co. v. *Boyce*, 36 Kan. 350, 13 Pac. 609; *Wachsmuth v. Merchants Nat. Bank*, 96 Mich. 426, 56 N. W. 9; *Cameron v. Pacific Exp. Co.*, 48 Mo. App. 99; *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1, 71 S. W. 1055; *Bingham v. Lipman*, 40 Ore. 363, 67 Pac. 98.

96—*Bieswanger v. Am. Bonding & T. Co.*, 98 Md. 287, 57 Atl. 202. The corporation is not liable if what was done by the servants was not in the line of duty. *Allen v. London*, etc., R. R. Co., L. R. 6 Q. B. 65; *Poulton v. London*, etc., R. R. Co., 2 Q. B. 534; *Edwards v. London*, etc., R. R. Co., L. R. 5 C. P. 445. But although they exceed the powers conferred on them and do what the corporation is not authorized to do, so long as they are attempting to do what they believe pertains to the service, the corporation is liable. *Lynch v. Metr. El. Ry. Co.*, 90 N. Y. 77, 43 Am. Rep. 141.

vail where the principal under whom the agent acts is a corporation.'⁹⁷

While the agent keeps within the limits of his authority, there is a legal unity between the corporation and its agent, as much when his acts are wrongful and tortious as when they are rightful.⁹⁸ And a corporation has even been held responsible [*141] for a *fraudulent issue of certificates of stock by its authorized agent, though the issue was in excess of its capital stock.⁹⁹

97—*Ranger v. Great Western R. R. Co.*, 5 H. L. Cas. 71, 86, per Lord Chancellor CRANWORTH. *Houldsworth v. Glasgow Bank*, L. R., 5 App. Cas. 317; *Weir v. Bell*, L. R., 3 Exch. D. 238; *American Nat. Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090; *Benedict v. Guardian Trust Co.*, 58 App. Div. 302, 68 N. Y. S. 1082. And see *Barwick v. Eng. Joint Stock Co.*, L. R. 2 Exch. 258; *Concord Bank v. Gregg*, 14 N. H. 331; *Scofield, etc., Co. v. State*, 54 Geo. 635; *N. Y., etc., R. R. Co. v. Schuyler*, 34 N. Y. 30; *Peeples v. Patapsco, etc., Co.*, 77 N. C. 233.

98—*New Orleans, etc., R. R. Co. v. Bailey*, 40 Miss. 395. See *Bruff v. Mali*, 36 N. Y. 200. A fraud committed by a bank cashier in the usual course of the business of the bank intrusted to him binds the bank. *Mackey v. Commercial Bank*, L. R., 5 P. C. 394; *Fishkill Savings Inst. v. Nat. Bank*, 80 N. Y. 162, 36 Am. Rep. 595; *Craigie v. Hadley*, 99 N. Y. 131.

99—*New York, etc., R. R. Co. v. Schuyler*, 34 N. Y. 30; *Tome v. Parkesburg Br. R. R. Co.*, 39 Md. 36, 17 Am. Rep. 540; *Allen v. South Boston R. R. Co.*, 150 Mass.

200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716; *Fifth Ave. Bank v. Forty-Second St., etc., R. R. Co.*, 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331. See *Merchants' Bank v. State Bank*, 10 Wall. 604; *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532. Where it was an officer's duty to issue certificates signed by himself and another officer, the former signed his own name and forged the other's and issued the instruments to a purchaser in good faith. The company refused to recognize the issue and register the shares and it was held liable for such refusal. *Shaw v. Port Philip, etc., Co.*, L. R., 13 Q. B. D. 103. To the same effect: *Fifth Ave. Bank v. Forty-Second St., etc., R. R. Co.*, 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331. Otherwise when such certificates are issued by an officer not charged with the duty of issuing certificates. *Hill v. Jewett Pub. Co.*, 154 Mass. 172, 28 N. E. 142, 26 Am. St. Rep. 230, 13 L. R. A. 193; *Manhattan Life Ins. Co. v. Forty-Second St., etc., R. R. Co.*, 139 N. Y. 146, 34 N. E. 776. Corporation is liable for fraud of its officers in wrongfully cancelling certificates

And it has been held that an action lies against a corporation for conspiracy.¹

A corporation organized and maintained for purely charitable purposes is not liable for the negligence or misfeasance of its agents or servants in the discharge of their duties.² The same rule applies to institutions and societies created by the state for public purposes, although they may be incorporated.³ A fire insurance patrol has been held to be within the rule in Pennsylvania,⁴ but otherwise in Massachusetts.⁵ There is also a difference of opinion whether railroad hospitals and the like are within the exemption.⁶

We have no occasion to follow this subject further at this time,

and issuing others. Factors, etc., *Co. v. Marine, etc., Co.*, 31 La. Ann. 149. But where for his own advantage a secretary without express instructions made a false report as to the validity of certain stock transfers, the Company was held not liable. *Brit. Mut. Bkg. Co. v. Charnwood*, L. R. 18, Q. B. D. 714.

1—*Buffalo, etc., Co. v. Standard Oil Co.*, 106 N. Y. 669.

2—*Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *Downs v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602; *Pepke v. Grace Hospital*, 130 Mich. 493, 90 N. W. 278; *Collins v. N. Y. Post Graduate Med. School, etc.*, 59 App. Div. 63, 69 N. Y. S. 106; *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624, 15 Atl. 553, 6 Am. St. Rep. 745, 1 L. R. A. 417. See *Hauns v. Central Ky. Lunatic Asylum*, 103 Ky. 562, 45 S. W. 890.

3—*White v. Ala. Insane Hospital*, 138 Ala. 479, 35 So. 454; *Hern v. Iowa State Agricultural Soc.*, 91 Ia. 97, 58 N. W. 1092, 24

L. R. A. 655; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 24 S. W. 1065; *Moody v. State Prison*, 128 N. C. 12; *Overholser v. National Home for Disabled Soldiers*, 68 Ohio St. 236, 67 N. E. 487, 96 Am. St. Rep. 658; *McAndrews v. Hamilton Co.*, 105 Tenn. 359, 58 S. W. 483; *Maia v. Eastern State Hospital*, 97 Va. 507, 47 L. R. A. 577.

4—*Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624, 15 Atl. 553, 6 Am. St. Rep. 745, 1 L. R. A. 417.

5—*Newcomb v. Boston Protection Department*, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778.

6—*Plant System Relief & Hospital Dept. v. Dickerson*, 118 Ga. 647, 45 S. E. 483; *Wabash R. R. Co. v. Kelly*, 153 Ind. 119, 52 N. E. 152, 54 N. E. 752; *Haggerty v. St. Louis, etc., R. R. Co.*, 100 Mo. App. 424, 74 S. W. 456; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95; *Sawdey v. Spokane Falls, etc., Ry. Co.*, 34 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880; *Union Pac. Ry. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 75.

as the rules regarding the liability of corporations for the acts of their agents and officers are the same with those which apply as between masters and servants generally, and will be considered in another place.

What has been said on this subject will apply to public corporations as well as to private. Towns, counties, villages and cities must respond for such torts of their officers, agents and servants as have been committed or suffered by corporate authority.⁷ So far as the rules which apply to them are peculiar, they will be examined hereafter.

Even the the State or the General Government may be guilty of individual wrongs; for while each is a sovereignty, it is a corporation also, and as such capable of doing wrongful acts. The difficulty here is with the remedy, not with the right. No sovereignty is subject to suits, except with its own consent.⁸ But either this consent is given by general law, or some tribunal is established with power to hear all just claims. Or if neither of these is done, the tort remains; and it is always to be presumed that the legislative authority will make the proper provision for redress when its attention is directed to the injury.

7—See *Commercial Elec. L. & P. United States*, 9 How. 386; *Split-Co. v. Tacoma*, 20 Wash. 288, 55 *tort v. State*, 108 N. Y. 205, 15 N. Pac. 219, 72 Am. St. Rep. 103; E. 322. The exemption applies to *Robertson v. Marion*, 97 Ill. App. boards and societies which are 332; *Horton v. Newell*, 17 R. I. agencies of the state. *Hern v. 571*, 23 Atl. 910; *post*, Chap. 19. *Iowa State Agricultural Soc.*, 91 8—*United States v. Peters*, 5 Ia. 97, 58 N. W. 1092, 24 L. Cranch, 139; *Osborn v. Bank of R. A. 655*; *Lord & P. Chemical U. S.*, 9 Wheat. 738; *United States Co. v. Board of Agriculture*, 111 *v. McLemore*, 4 How. 286; *Hill v. N. C. 135*, 15 S. E. 1032.

WRONGS IN WHICH TWO OR MORE PERSONS PARTICIPATE.

Classification. Wrongs, as respects the number of persons who may be responsible for their commission, are either individual or joint. Some wrongs are in their nature necessarily individual, because it is impossible that two or more should together commit them. The case of the oral utterance of defamatory words is an instance; this is an individual act, because there can be no joint utterance. He alone can be liable who spoke the words; and if two or more utter the same slander at the same time, still the utterance of each is individual, and must be the subject of a separate proceeding for redress.¹ It has been said, however, that if several unite in singing the same defamatory song, the singing may be treated as the joint slander of all;² but this is on grounds that distinguish it from an ordinary speaking; each speaker having his part in a joint utterance, and the individual voice being a part only of what reaches the ear of the hearer as a whole.

Conspiracy. On the other hand, some torts are in their nature joint torts, because the action of several is required to accomplish them. Reference is not had here to the physical ability to accomplish the wrongful act, such as might be required in overturning a house or in checking by a dam the flow of a rapid river, but to some element in the wrong that consists in the concurrence of two or more actors. Such a case would be a conspiracy to ruin one in his reputation, or to defraud him *of his property; originating in combination, and car- [*143] ried out by joint action, or at least in pursuance of the

1—*Chamberlain v. Goodwin*, *State v. Roulstone*, 3 Sneed, 107; Cro. Jac. 647; *Swithin v. Vincent*, *Webb v. Cecil*, 9 B. Mon. 198, 48 2 Wils. 227; *Chamberlaine v. Willmore*, Palm. 313; *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141; Am. Dec. 423.

2—*Dictum*, *Thomas v. Rumsey*, 6 Johns. 26, 31. Even here, how-

joint arrangement and understanding.³ If conduct is complained of which only becomes actionable because of the dishonest combination to accomplish some wrongful act, this combination must be shown, and one man cannot combine with himself; he must have associates. It is seldom, if ever, however, that a case can occur in which a man may not have redress without counting on the joint wrong; for the injury accomplished by means of the conspiracy may be treated as a distinct wrong in itself, irrespective of the steps that led to it. The general rule is, that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action.⁴ The damage is the gist of the action, not the

ever, we suppose the person wronged might bring his separate action for the tenor slander, the bass slander, etc.

3—*Saunders v. Freeman*, Plow. 209; *Burton v. Fulton*, 49 Pa. St. 151; *Hutchins v. Hutchins*, 7 Hill, 104; *S. C. Bigelow*, Lead Cas. on Torts, 207; *Brannock v. Bouldin*, 4 Ired. 61; *Wildee v. McKee*, 111 Pa. St. 335. The text approved, *Buckley v. Mulville*, 102 Ia. 602, 70 N. W. 107, 63 Am. St. Rep. 479.

4—*Saville v. Roberts*, 1 Ld. Raym. 374; *Cotterell v. Jones*, 11 C. B. 713; *Sheple v. Page*, 12 Vt. 519; *Patten v. Gurney*, 17 Mass. 186, 9 Am. Dec. 141; *Easton v. Petway*, 1 Dev. & Bat. 44; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Laverty v. Von Arsdale*, 65 Pa. St. 507; *Parker v. Huntingdon*, 2 Gray, 124; *Bowen v. Matheson*, 14 Allen, 499; *Herron v. Hughes*, 25 Cal. 555; *Page v. Parker*, 40 N. H. 47; *Same v. Same*, 43 N. H. 363, 80 Am. Dec. 172; *Lasher v. Littell*, 202 Ill. 551, 67 N. E. 372; *Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 716; *Buckley v. Mulville*, 102

Ia. 602, 70 N. W. 107, 63 Am. St. Rep. 479; *De Wolf v. Dix*, 110 Ia. 553, 81 N. W. 779; *Handley v. Louisville, etc., R. R. Co.*, 105 Ky. 162, 48 S. W. 429, 88 Am. St. Rep. 298; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; *May v. Wood*, 172 Mass. 11, 51 N. E. 191; *Commercial Union Ass. Co. v. Shoemaker*, 63 Neb. 173, 88 N. W. 156; *Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *Huttley v. Simmons*, (1897) 1 Q. B. 181. The general agent of a railroad company posted a notice that any employee trading with plaintiff would be discharged. The latter sued the agent and the company. As the agent's act was not unlawful, it was held there could be no conspiracy. *Payne v. Railroad Co.*, 13 Lea, 507. An action for conspiracy will lie against

conspiracy;⁵ and though the conspiracy may be said to be of itself a thing amiss, it must nevertheless, until something has been accomplished in pursuance of it, be looked upon as a mere unfulfilled intention of several to do mischief.⁶ When [*144] the mischief is accomplished, the conspiracy becomes important, as it affects the means and measure of redress; for the party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it. The significance of the conspiracy consists, therefore, in this: That it gives the person injured a

three men where one, in pursuance of a joint plan, bought goods from plaintiff on credit, sold them to the other two and absconded, although he made no positive fraudulent representation, when he bought them. "The essence of a conspiracy, so far as it justifies a civil action for damages, is a concert or combination to defraud or to cause other injury to person or property which actually results in damage to the person or property of the person injured or defrauded." *Dwight C. Place v. Minster*, 65 N. Y. 89. So a conspiracy to boycott a steamer line resulting in damage is actionable. *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. D. 476.

5—*Jones v. Baker*, 7 Cow. 445; *Hutchins v. Hutchins*, 7 Hill, 104; *Sheple v. Page*, 12 Vt. 519; *Laverty v. Van Arsdale*, 65 Pa. St. 507; *Adler v. Fenton*, 24 How. 407; *Bush v. Sprague*, 51 Mich. 41; *Douglass v. Winslow*, 52 N. Y. Sup. Ct. 439; *Garing v. Fraser*, 76 Me. 37; *Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 716; *Mendenhall v. Stewart*, 18 Ind. App. 262, 47 N. E. 943; *Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R.

A. 629; *May v. Wood*, 172 Mass. 11, 51 N. E. 191; *Commercial Union Ass. Co. v. Schoemaker*, 63 Neb. 173, 88 N. W. 156; *Van Horn v. Van Horn*, 56 N. J. L. 318, 23 Atl. 669; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840. "Moreover, it is a general rule, that a conspiracy cannot be made the subject of a civil action, unless something is done which, without the conspiracy, would give a right of action. The damage done is the gist of the action, not the conspiracy. When the mischief contemplated is accomplished, the conspiracy becomes important, as it may affect the means and measure of redress. The party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it; and the fact of conspiracy may aggravate the wrong; but the simple act of conspiracy does not furnish a substantive ground of action." *Robertson v. Parks*, 76 Md. 118, 135, 24 Atl. 411.

6—*Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Place v. Minster*, 65 N. Y. 89; *Cotterell v.*

remedy against parties not otherwise connected with the wrong.⁷ It is also significant as constituting matter of aggravation, and as such tending to increase the plaintiff's recovery.⁸

As it is the wrong accomplished—in other words, the deprivation of some right—that must support the action, it follows that if what the plaintiff has been deprived of was not a right at all, but an advantage merely hoped for, he cannot maintain his suit. Therefore, he cannot maintain an action for conspiring to induce one not to make him a gratuity by will; he having no legal right to such gratuity.⁹ Nor can he have an action for conspiracy to induce his debtor to put his property out of his hands; since the fraudulent transfer leaves it still subject to legal process.¹⁰ Nor, in general, will an action lie for conspiracy to induce one to violate his contract; though it would seem that some cases might be so extraordinary in their facts as to be exceptions to this general rule.¹¹

Jones, 11 C. B. 713; Schwab v. Mabley, 47 Mich. 572; Bush v. Sprague, 51 Mich. 41; McHenry v. Sneer, 56 Ia. 649.

7—Severinghaus v. Beckman, 9 Ind. App. 388, 36 N. E. 716; Mendenhall v. Stewart, 18 Ind. App. 262, 47 N. E. 943; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840

8—Kimball v. Harman, 34 Md. 407; Street v. Packard, 76 Me. 148; Garin v. Fraser, 76 Me. 37. When actionable injury is set out as done by several, conspiracy need not be shown except to secure a joint judgment. Lubricating Oil Co. v. Standard Oil Co., 42 Hun, 153. In an action against several for deceit by false representations a fraudulent combination to deceive and defraud must be shown; but when it is shown,

any act of one in furtherance of the conspiracy is the act of all. Brinkley v. Platt, 40 Md. 529; Hornblower v. Crandall, 78 Mo. 581; Breedlove v. Bundy, 96 Ind. 319. Mere silent approval of an unlawful act does not render one liable as a conspirator. Brannock v. Bouldin, 4 Ired. 61.

9—Hutchins v. Hutchins, 7 Hill, 104.

10—Austin v. Barrows, 41 Conn. 287.

11—A conspiracy to ruin an actor by hisses, groans, etc., during his performances may be actionable, though the public have a right to manifest disapproval of an actor's performance. The wrong consists in the combination to do it unfairly and of malice. Gregory v. Brunswick, 6 M. & G. 205. That a conspirator expected to derive no profit from the wrong is immaterial to his responsibility. Stockley v. Hornidge, 8 C. & P. 11.

*Though a conspiracy is charged, yet if on the trial, [*145] the evidence connects but one person with the wrong actually committed, the plaintiff may recover against him as if he had been sued alone.¹² It of course follows that a conspiracy, though alleged, need not be proved in any case, in order to recover against those who actually participated in the wrong charged.¹³

What Constitutes Participation. Most wrongs may be committed either by one person or by several. When several participate, they may do so in different ways, at different times, and in very unequal proportions. One may plan, another may procure the men to execute, others may be the actual instruments in accomplishing the mischief, but the legal blame will rest upon all as joint actors. In some cases one may also become a joint-wrong-doer by consenting to and ratifying what has been done

12—*Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 716; *Mendenhall v. Stewart*, 18 Ind. App. 262, 47 N. E. 943; *Young v. Gormley*, 119 Ia. 546, 93 N. W. 965; *Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669; *Keit v. Wyman*, 67 Hun, 337, 22 N. Y. S. 133; *Fillman v. Ryan*, 168 Pa. St. 484, 32 Atl. 89. READ, J. "This is an action upon the case in the nature of a conspiracy against the defendants for falsely and maliciously combining and conspiring to prevent the plaintiff from obtaining employment as a school teacher, and by reason of which combination and conspiracy he was deprived of employment as a school teacher, and prevented from earning support for himself and his family as such. The damage sustained by the plaintiff is the ground of the action, not the conspiracy. 'Where the action is brought against two or more, as concerned in the wrong done, it is necessary, in order to recover against all of them, to prove a

combination or joint act of all. For this purpose it may be important to establish the allegation of a conspiracy. But if it turn out on the trial that only one was concerned, the plaintiff may still recover, the same as if such one had been sued alone. The conspiracy or combination are nothing, so far as sustaining the action goes, the foundation of it being the actual damage done to the party.' *Hutchins v. Hutchins*, 7 Hill, 104; *Jones v. Baker*, 7 Cowen, 445; *Parker v. Huntington*, 2 Gray, 124. The court was therefore clearly in error in saying there could be no recovery against one only." *Laverty v. Van Arsdale*, 65 Pa. St. 507, 509. But to warrant a judgment in an action against two for conspiracy to defraud by a collusive judgment, both must be guilty of fraud. *Collins v. Cronin*, 117 Pa. St. 35, 11 Atl. 869.

13—*Young v. Gormley*, 119 Ia. 546, 93 N. W. 965; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376.

by others. But this cannot be done by merely approving a wrong, or by expressing pleasure or satisfaction at its being accomplished.¹⁴

[*146] ***Adoption of a Wrong.** In order to constitute one a wrong-doer by ratification, the original act must have been done in his interest, or been intended to further some purpose of his own. Lord COKE, on this subject, says: "He that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agree-

14—Thus, where one who knew that a bailee of a team had hired it to go to one place, rode with him to another, in violation of the bailee's duty, it was held he was not liable as a trespasser in so doing. *Hubbard v. Hunt*, 41 Vt. 376. See, also, *Langdon v. Bruce*, 27 Vt. 657. One who sees a fraud being accomplished before his eyes, by inducing a person to become surety for another who is irresponsible, does not become liable for fraud by merely failing to put the party on his guard. "If the defendants merely knew of the designs and contrivances of the principal party to impose on the plaintiff, that would not be a conspiracy, though they did not, as they might, disclose the matter thus known by them." RUFFIN, Ch. J., in *Brannock v. Bouldin*, 4 Ired. 61. Any person present at the commission of a trespass, here an assault, encouraging or exciting the same, or who approves the same, is liable as principal; and proof that one is present without disapproving it, is evidence from which in connection with other circumstances a jury may infer assent. Mere presence as a spectator does not render one a participator. *Hilmes v. Stroebe*, 59

Wis. 74. See *Rhinehart v. Whitehead*, 64 Wis. 42. *Blue v. Christ*, 4 Ill. App. 351. Mere membership in an association does not make one liable for a malicious prosecution instituted by the association. The member must be shown to have aided in it intentionally. *Johnson v. Miller*, 63 Ia. 529; 69 Ia. 562. Joint liability for false imprisonment only covers the time when all were participants. *Bath v. Metcalf*, 145 Mass. 274, 14 N. E. 133. To make one liable for false arrest by another, mere approval is not enough, he must have encouraged it in some way. *Cooper v. Johnson*, 81 Mo. 483. See, further, as to liability of party for false imprisonment by officer or magistrate. *Gelzenleuchter v. Niemeyer*, 64 Wis. 316, 54 Am. Rep. 616; *Fenelon v. Butts*, 49 Wis. 342; *Gibbs v. Randlett*, 58 N. H. 407; *Ocean S. S. Co. v. Williams*, 69 Ga. 251; and by his attorney; cases, *infra*, p. *152 n. 1. A conductor who permits a passenger to travel on his train carrying goods known by the conductor to have been stolen, is not thereby liable to the owner. If he takes part of such goods as fare he is liable to that extent. *Randlette v. Judkins*, 77 Me. 114.

ment subsequent amounteth to a commandment.”¹⁵ Chief Justice TINDALL presents the same principle more fully, in the following language: “That an act for another by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it *be founded on a tort or a contract, to the [*147] same extent as by, and with all the consequences that follow from, the same act done by his previous authority. Such was precisely the distinction taken in the Year Book, 7 Hen. 4, fo. 35,—that if the bailiff took the heriot claiming property in himself, the subsequent agreement of the lord would not amount to a ratification of his authority, as bailiff at the time; but if he took it at the time as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by ANDERSON, Ch. J., in Godbolt’s Reports, 109. ‘If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, takes my goods, not as servant or bailiff to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot; for once he was a trespasser and his intent was manifest.’”¹⁶ The

15—4 Inst. 317. See *Eastern Counties R. R. Co. v. Broom*, 6 Exch. 314; *Hull v. Pickersgill*, 1 B. & B. 282; *Wilson v. Tumman*, 6 M. & Gr. 236; *Harrison v. Mitchell*, 13 La. Ann. 260; *Collins v. Waggoner*, Breese, 26; *Beveridge v. Rawson*, 51 Ill. 504; *Allred v. Bray*, 41 Mo. 484; *Grund v. Van Vleck*, 69 Ill. 479; *Vanderbilt v. Turnpike Co.*, 2 N. Y. 479; *Brainerd v. Dunning*, 30 N. Y. 211; *Russo v. Maresca*, 72 Conn. 51, 43 Atl. 552. The government is liable for

the illegal acts of its officers which it expressly adopts. *Wiggins v. United States*, 3 Ct. Claims, 412. See *Buron v. Denman*, 2 Exch. 167.

16—*Wilson v. Tumman*, 6 M. & Gr. 236, 242. See, also, *Bird v. Brown*, 4 Exch. 786, 798. It was held in *Wilson v. Tumman* that if a sheriff had made himself liable as trespasser, the subsequent ratification of his act by the plaintiff would not make him a trespasser also; the sheriff not being his

ratification should also be with full knowledge of the facts, or with the purpose of the party, without inquiry, to take the consequences upon himself.¹⁷ It is not conclusive that the party receives and appropriates a benefit from what is done,¹⁸ or that he employs counsel to defend the trespasser,¹⁹ or that he takes steps in the direction of a compromise.²⁰ These are acts which any one may do for another as a matter of friendship [*148] or favor merely, and *without contemplating further responsibility than is involved in the acts themselves.

But while the mere expression of approval of a wrong, or gratification at its commission, would not of itself constitute a legal injury, by relation or otherwise, there may, perhaps, be an exception to this general rule in the case of a wrong which one does in excess of authority while in the employ of another. The question what the master's authority will authorize and cover is primarily one between the parties to the contract of service; and we see no reason to question that the master may enlarge it retrospectively, so as to make it embrace any action which the servant has done in reliance upon or under pretence of it. And it is difficult to distinguish an approval of the act from an adoption, under the circumstances indicated.

Where a city approved, accepted and paid for street grading, which had been done in an illegal manner, it was held to have

agent, but the agent of the law. Following this decision are *Tilt v. Jarvis*, 7 U. C. C. P. 145; *McLeod v. Fortune*, 19 U. C. Q. B. 98. But see *Murray v. Lovejoy*, 2 Cliff. 191, and 3 Wall, 1; *Knight v. Nelson*, 117 Mass. 458.

17—*Lewis v. Read*, 13 M. & W. 834; *Adams v. Freeman*, 9 Johns. 118; *Dally v. Young*, 3 Ill. App. 39. The adoption must be clear and founded on a clear knowledge of the tort committed. Here defendant was sued for false arrest in an action brought by another in his name. *Tucker v. Jerri*s, 75 Me. 184.

18—*Hyde v. Cooper*, 26 Vt. 552; *Lewis v. Read*, 13 M. & W. 834. But, if a principal derives all the benefit derivable from his agent's tort and has the only interest in it, he is liable for the wrong. *Dunn v. Hartford, etc., R. R. Co.*, 43 Conn. 434.

19—*Buttrick v. Lowell*, 1 Allen, 172, 79 Am. Dec. 721. *Eastern Counties R. R. Co. v. Broom*, 6 Exch. 314. See *Woollen v. Wright*, 1 H. & C. 554.

20—*Roe v. Birkenhead, etc., Railway Co.*, 7 Exch. 36; *S. C.* 7 Eng. L. and Eq. 546.

adopted the wrong.²¹ The mere purchase of logs or timber cut by a trespasser does not make the purchaser liable for the trespass.²² "In order to charge an absent party with the commission of a trespass, it is necessary to prove something more than the fact that he in some way received the fruits of the trespass. There must be evidence of a *scienter*—evidence tending to show that he received the fruits of the trespass with a guilty knowledge—with the knowledge that they had been procured from the land of another by a trespass."²³ A third party, acting entirely on his own initiative and in his own behalf, dug a ditch through a natural ridge on his own land the result of which was to drain several small lakes on the defendant's land into a lake on the plaintiff's land, causing it to overflow and injure the plaintiff's land. The defendant's land was greatly benefitted but he knew nothing about the digging of the ditch until after it was done. The party who dug the ditch tried on several occasions to collect part of the cost from defendant and he, after having repeatedly refused to contribute, finally paid the party five dollars. It was held that the defendant was not liable, that in order to ratify a tort it must have been done on behalf of the defendant and, in regard to the payment of the five dollars, the court says: "It cannot be said that this act of the defendant, in the entire absence of knowledge on his part of the intended digging of the ditch, and where it was not done in his name or for his benefit, was a ratification of the act that would create a liability."²⁴

Joint Liability of Officer and Party. Questions of ratification often arise between the party to a suit and the officer who serves his process.²⁵ Whatever the officer is, by his process, commanded

21—*Brown v. Webster City*, 115 Ia. 511, 88 N. W. 1070.

22—*Holliday v. Jackson*, 30 Mo. App. 263; *Klotz v. Lindsay*, 88 Mo. App. 594; *Benton v. Beattie*, 63 Vt. 186, 22 Atl. 422.

23—*Holliday v. Jackson*, 30 Mo. App. 263, 265. The ratification of a trespass does not make one liable for vindictive damages. *Lei-*

ter v. Day, 35 Ill. App. 248. An estate is not liable for malicious acts of an executor when it has received no benefit therefrom. *Carr v. Tate*, 107 Ga. 237, 33 S. E. 47.

24—*Reed v. Rich*, 49 Ill. App. 262.

25—*Perkins v. Proctor*, 2 Wils. 382; *Parsons v. Lloyd*, 3 Wils.

to do, is understood to be directed by the party himself, who causes the writ to be issued and delivered to the officer, that the exigency thereof may be complied with. Therefore, to the extent of the command, the party is responsible for what the officer shall do; but as the process would be a full protection if legal, it follows that there can be no liability of the party, because of obedience to the command of the process, unless the process itself was issued without authority. Supposing the process to be legal, there may still be liability on the part of the officer, if he shall overstep his authority, or shall take the goods of one person when commanded to take those of another, and in other like cases. But in these cases the party to the writ is neither morally nor technically responsible for the departure from the command of the writ, unless he advised or assisted the officer therein.²⁶

[*149] Mere neglect to interpose objection *is not sufficient, nor, it seems, is an expression of opinion that the officer's

341; *Barker v. Braham*, 3 Wils. 377; *Currey v. Pringle*, 11 Johns. 444; *McGuinty v. Herrick*, 5 Wend. 240; *Jacques v. Parks*, 96 Me. 268, 52 Atl. 763; *Farmer v. Crosby*, 43 Minn. 459, 45 N. W. 866. See *Wing v. Hussey*, 71 Me. 185, on what constitutes participation in such case.

26—*Wilson v. Tumman*, 6 M. & G. 244; *Whitmore v. Green*, 13 M. & W. 104; *Walley v. Mc'Connell*, 13 Q. B. 911; *Averill v. Williams*, 4 Denio, 295, 47 Am. Dec. 252; *Chapman v. Douglass*, 5 Daly, 244; *Abbott v. Kimball*, 19 Vt. 551, 47 Am. Dec. 708; *People's B. & L. Ass. v. McElroy*, 79 Ill. App. 266; *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664; *Teel v. Miles*, 51 Neb. 542, 71 N. W. 296; *Small v. Benfield*, 66 N. H. 206, 20 Atl. 284. See *Bissell v. Gold*, 1 Wend. 210, 19 Am. Dec. 480; *Taylor v. Trask*, 7 Cow. 249; *Snydacker v.*

Brosse, 51 Ill. 375. By taking out an execution and delivering it to the officer the party is responsible for the sale, and by doing this and taking the order on which an attachment is based he is held to have ratified the act of the officer in levying an attachment on the property. *Peterson v. Foli*, 67 Ia. 402. For levy by his direction under a judgment jurisdictionally void, the plaintiff is liable jointly with the officer. *Shaw v. Rowland*, 32 Kan. 154. If upon a void judgment an execution regular on its face is issued the plaintiff is liable for the proceeds which come to his hands from a sale but not as for a conversion where the officer's action made the levy invalid but the plaintiff was not connected with the irregularity. *Gunz v. Heffner*, 33 Minn. 215. If a plaintiff directs service on specific property he is liable if the officer

proceedings are warranted by law.²⁷ But where a plaintiff and his attorney were aware of all the facts concerning the levy upon property not belonging to the defendant in the writ, approved of it, and on request refused to consent to its being released, they were held jointly liable with the officer as trespassers.²⁸ Many cases go further than this, and hold the party responsible where the officer has departed from the command of his writ, or from his instructions, if the party has afterwards approved what was done, and has taken, or is seeking to take, a benefit from it.²⁹ Where, however, the plaintiff receives only such benefits as he would have been entitled to under a lawful service of the writ, he cannot, from this fact alone, be held to be a participant in the officer's trespasses.³⁰ If the party directs, advises or partici-

is a trespasser; otherwise if the process is simply given to the officer and he decides on the property to be seized. *Corner v. Mackintosh*, 48 Md. 374. For the omission of the officer to serve properly a valid writ or to allow the selection of an exemption, though in the presence of the plaintiff, the latter is not liable. *Michels v. Stork*, 44 Mich. 2. A sheriff wrongfully took money from the person of a prisoner and creditors severally issued attachments against the money. The officers and creditors were held not jointly liable in tort. *Dahms v. Sears*, 13 Oreg. 47.

27—*Hyde v. Cooper*, 26 Vt. 552.

28—*Cook v. Hopper*, 23 Mich. 511. A party who orders the sheriff to refuse sufficient bail and keep defendant in custody is liable. *Gibbs v. Randlett*, 58 N. H. 407.

29—See *Tompkins v. Haile*, 3 Wend. 406; *Root v. Chandler*, 10 Wend. 111; *Allen v. Crary*, 10 Wend. 349, 25 Am. Dec. 566; *Davis v. Newkirk*, 5 Denio, 94; *Ball*

v. Loomis, 29 N. Y. 412; *Leach v. Francis*, 41 Vt. 670; *Stroud v. Humble*, 2 La. Ann. 930; *Bonnel v. Dunn*, 28 N. J. 153; *Knight v. Nelson*, 117 Mass. 458; *Wetzell v. Waters*, 18 Mo. 396; *Nelson v. Cook*, 17 Ill. 443; *Syndacker v. Brosse*, 51 Ill. 357; *Beveridge v. Rawson*, 51 Ill. 504; *Deal v. Bogue*, 20 Penn. St. 228, 57 Am. Dec. 702; *Reithmann v. Godsmann*, 23 Colo. 202, 46 Pac. 684. Where party and officer pleaded jointly admitting taking, held jointly liable, as by the plea the party adopted the officer's course. *Taylor v. Ryan*, 15 Neb. 573.

30—*Hyde v. Cooper*, 26 Vt. 552. The case was one in which an officer had proceeded to sell property on execution without sufficient notice. The plaintiff in the execution was sued in trespass as a participant in the wrong. It appeared that before the sale he had expressed the opinion that the notice was sufficient, and also that he received the money on execution. REDFIELD, Ch. J., "As a general rule, perhaps, where the mis-

[*150] pates in the wrongful act he is, of course, liable.³¹ *One method of ratification as between the party to the suit and the officer is by the former giving to the latter a bond of

take is one of fact, and such as makes the officer a trespasser, and the party knowing all the facts, consents to take the avails of a sale, or where he counseled the very act, which creates the liability of the officer, he is implicated to the same extent as the officer. But when the party does not direct or control the course of the officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser, even by relation, the party is not affected by it, even when he receives money, which is the result of such irregularity, although he was aware of the course pursued by the officer. He is not liable unless he consents to the officer's course, or subsequently adopts it. And if he does that, he cannot maintain an action against the officer for doing the act, and the consequence would be that, if receiving the avails of a sale on execution were to be regarded in all cases as amounting to a ratification of the conduct of the officer, in the sale, it must preclude the creditor from all suits against the officer on that account: which has never been so regarded. The party may always take money, which the officer informs him he has legally collected, without assuming the responsibility of indorsing the perfect legality of the entire detail of the officer's official conduct in the matter.

"For if the officer is compelled

to refund to the debtor, on account of his irregularity of procedure, that will not affect the right of the creditor to retain the money. He is still entitled to retain the money against the officer. And the party cannot claim the money of the creditor, without thereby affirming the sale. So that the creditor's accepting the amount of money, for which the property is sold, is no more a ratification of the conduct of the officer than if he took the money of the officer on any other liability. The money is the officer's, whether he was a trespasser or not, and he is, at all events, liable to the creditor. If the sale was irregular, that is his loss, and he must still pay the creditor; and accepting the money is but taking pay for the officer's liability to the creditor for his default in the sale if it was irregular. So that, in any view of the case, there is no ground of implicating the defendant."

The case of *Lewis v. Read*, 13 M. & W. 834, lays down the same doctrine. That was a case in which bailiffs distrained goods not belonging to the tenant and not on the demised premises. These were sold and the landlord received the proceeds. *Held*, not to make him liable unless he ratified the act of the bailiffs with knowledge of the irregularity, or chose, without inquiry, to adopt their acts and take upon himself all risks.

31—*Riethman v. Godson*, 23

indemnity, or other security, against the consequences of his action.³²

***Participation by Attorneys.** An attorney who de- [*151]livers a writ to an officer for service does not personally assume any responsibility in respect thereto, except to this extent, that he is understood as directing the officer to proceed to obey the command of the writ. If, therefore, the writ is illegal, and the officer makes himself a trespasser in serving it, the attorney is liable as joint trespasser with him.³³ But if the officer exceeds the command of the writ, or does anything which its command, if legal, would not justify, the attorney is not responsible,³⁴ unless he counsels or assists in it, in which case his liability rests upon the same ground as that of any other participant in a trespass.³⁵ "An attorney is only liable where he institutes proceedings without authority from his client, or where he and his client fraudulently conspire to do an illegal act, or where he acts dishonestly, with some sinister view, or for some improper purpose of his own which the law considers malicious."³⁶ If an attorney sues out an illegal writ, the party for whom he acts is

Colo. 202, 46 Pac. 684; *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664; *Castile v. Ford*, 53 Neb. 507, 73 N. W. 945; *Streeter v. Johnson*, 22 Nev. 194, 44 Pac. 819.

32—*Murray v. Lovejoy*, 2 Cliff. 191, and 3 Wal. 1; *Herring v. Hop-pock*, 15 N. Y. 409, 413; *Root v. Chandler*, 10 Wend. 110, 25 Am. Dec. 546; *Knight v. Nelson*, 117 Mass. 458; *Lewis v. Johns*, 34 Cal. 629; *Crossman v. Owen*, 62 Me. 528; *Rice v. Wood*, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609; *Mac-Veagh v. Hanford*, 29 Ill. App. 606; *Kamenck v. Castleman*, 29 Mo. App. 658; *Ahearn v. Connell*, 72 N. H. 238, 56 Atl. 189; *Dyett v. Hyman*, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533. It may be done in much less formal man-

ner. See *Bishop v. Viscountess Montague*, Cro. Eliz. 824.

33—*Burnap v. Marsh*, 13 Ill. 535; *Johnson v. Bouton*, 35 Neb. 898, 53 N. W. 995.

34—*Seaton v. Cordray*, Wright (Ohio), 102; *Averill v. Williams*, 1 Denio, 501; *Adams v. Freeman*, 9 Johns. 118; *Vanderbilt v. Turn-pike Co.*, 2 N. Y. 479; *Ford v. Williams*, 13 N. Y. 577, 67 Am. Dec. 83; *Cook v. Hopper*, 23 Mich. 511.

35—*Hardy v. Keeler*, 56 Ill. 152; *Cook v. Hopper*, 23 Mich. 511; *MacVeagh v. Hanford*, 29 Ill. App. 606; *Tenney v. Harvey*, 63 Vt. 520, 22 Atl. 659.

36—*Farmer v. Crosby*, 43 Minn. 459, 461, 45 N. W. 866. And see *Roth v. Shupp*, 94 Md. 55, 50 Atl. 430.

so far identified with him in the proceedings that he is responsible for what is done under it;³⁷ but the plaintiff is not responsible for any illegal action taken or directed by the attorney which the plaintiff did not advise, consent to, or participate in, and which was not justified by any authority he had given.³⁸

Wrongs by Deputies. Whenever an officer is authorized by law to appoint a deputy who shall be empowered to perform his official duties, the rule is general that the principal shall respond for all the deputy's misfeasances or nonfeasances, while he acts by color of his appointment. Taking the case of the sheriff as an illustration, the rule is laid down very clearly in the numerous cases cited in the margin, that the sheriff is liable to the plaintiff in the writ for the deputy's misconduct or neglect to his injury.³⁹ But he is also liable for the

37—*Barker v. Braham*, 3 Wils. 368; *Bates v. Pilling*, 6 B. & C. 38; *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185; *Newberry v. Lee*, 3 Hill, 523; *Armstrong v. Du-bois*, 4 Keyes, 291. A plaintiff may be liable for his attorney's arresting a man on execution without express instructions from him. *Shattuck v. Bill*, 142 Mass. 56; *Guillaume v. Rowe*, 94 N. Y. 268, 46 Am. Rep. 141. See *Gearon v. Bank*, 50 N. Y. Super. Ct. 264.

38—*Freeman v. Rosher*, 13 Q. B. 780; *Ferguson v. Terry*, 1 B. Mon. 96; *Adams v. Freeman*, 9 Johns. 118; *Fox v. Jackson*, 8 Barb. 355; *Welsch v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519. On the other hand an attorney is not to be charged with participation in the evil intention of his client from the mere fact that he acts as attorney in a matter in which the client acts fraudulently. *McKinney v. Curtiss*, 60 Mich. 611. Nor in malicious prosecution from knowledge of his client's malice alone. Otherwise if he also knows

there is no probable cause. *Peck v. Chouteau*, 91 Mo. 138, 60 Am. Rep. 236; *Staley v. Turner*, 21 Mo. App. 244.

39—*Blunt v. Sheppard*, 1 Mo. 219; *Marshall v. Hosmer*, 4 Mass. 60; *Esty v. Chandler*, 7 Mass. 464; *M'Intyre v. Trumbull*, 7 Johns. 35; *Curtis v. Fay*, 37 Barb. 64; *Pond v. Leman*, 45 Barb. 152; *Mason v. Ide*, 30 Vt. 697; *Seaver v. Pierce*, 42 Vt. 325; *Stimpson v. Pierce*, 42 Vt. 334; *Whitney v. Farrar*, 51 Me. 418; *Remlinger v. Weyker*, 22 Wis. 383; *Clute v. Goodell*, 2 McLean, 193; *Prosser v. Coots*, 50 Mich. 262; *Grabenheimer v. Budd*, 40 La. Ann. 107, 3 So. 724; *Case v. Hulsebush*, 122 Ala. 212, 26 So. 155; *Frizzell v. Duffer*, 58 Ark. 612, 25 S. W. 1111; *Elwell v. Reynolds*, 6 Kan. App. 545, 51 Pac. 578. He may be liable after his term has expired for acts of a deputy to whom he has turned over an unexecuted writ. *Ross v. Campbell*, 19 Hun, 615. He is liable for disobedience of instructions, though in good faith, by the

deputy's misfeasances and nonfeasances which injure the defendant⁴⁰ or any third person.⁴¹ Nevertheless, the fact that the sheriff is responsible does not relieve the deputy, who is equally liable with the sheriff for all his positive misfeasances;⁴² but when a mere neglect to perform an official duty is complained of, only the sheriff can be sued, because only upon him does the official duty rest.⁴³

General Rules of Joint Liability. Proceeding now to a particular examination of the rules of liability where the fault is legally or otherwise chargeable to more than one person, it will be convenient to classify the wrongs into *those of [*153] intent and those not of intent, inasmuch as the existence of wrongful intent is in many cases of the highest importance.

1. Wrongs Intended. Where several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, it is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all.⁴⁴ To require

deputy. *Smith v. Judkins*, 60 N. H. 127. He is not liable for the default of a special deputy selected by the plaintiff. *Skinner v. Wilson*, 61 Miss. 90, and see pp. *465-467, *post*.

40—*Woodgate v. Knatchbull*, 2 T. R. 148; *Grunnell v. Phillips*, 1 Mass. 529; *Knowlton v. Bartlett*, 1 Pick. 270. See *Morgan v. Chester*, 4 Conn. 387; *Waterbury v. Westervelt*, 9 N. Y. 598.

41—*Ackworth v. Kempe*, Doug. 41; *Campbell v. Phelps*, 17 Mass. 244; *Norton v. Nye*, 56 Me. 211; *Rider v. Chick*, 59 N. H. 50. But the sheriff is not liable to a third party who is merely injured as surety for the defendant by some misconduct of the deputy. *Harrington v. Ward*, 9 Mass. 251.

42—*Purrington v. Loring*, 7

Mass. 388; *Ross v. Philbrick*, 39 Me. 29; *Remlinger v. Weyker*, 22 Wis. 383.

43—*Cameron v. Reynolds*, Cowp. 403; *Hutchinson v. Parkhurst*, 1 Aik. 258; *Buck v. Ashley*, 37 Vt. 475; *Armistead v. Marks*, 1 Wash. (Va.) 325; *Rose v. Lane*, 3 Humph. 218; *Paddock v. Cameron*, 8 Cow. 212. The rule seems to be different in Massachusetts. *Draper v. Arnold*, 12 Mass. 449. On his special promise to pay money collected on execution the deputy may be held. *Tuttle v. Love*, 7 Johns. 470; *Rose v. Lane*, 3 Humph. 218; *Abbott v. Kimball*, 19 Vt. 551, 47 Am. Dec. 708. See generally Chap. XIII, *post*.

44—*Miller v. Fenton*, 11 Paige, 18; *Nelson v. Cook*, 17 Ill. 443; *Turner v. Hitchcock*, 20 Iowa, 310;

the party injured to ascertain and point out how much of the injury was done by one person and how much by another, or what share of responsibility is fairly attributable to each as between themselves, and to leave this to be apportioned among them by the jury according to the mischief found to have been done by each, would, in many cases, be equivalent to a practical denial of justice. The law does not require this, but on the other hand permits the party injured to treat all concerned in the injury as constituting together one party, by their joint co-operation accomplishing certain injurious results, and liable to respond to him in a gross sum as damages.⁴⁵

But while the law permits all the wrong-doers to be proceeded against jointly, it also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy regardless of the participation of the others. While the wrong is joint it is also in contemplation of law several; the wrong of one man in beating another is not the less his personal wrong because of a third person having held the assaulted party while another delivered the blows, or because still others stood by, and by force or threats prevented the intervention of the police. The officer who serves a void writ is not the less an individual wrong-doer

McMannus v. Lee, 43 Mo. 206, 97 Am. Dec. 386; *Wallace v. Miller*, 15 La. Ann. 449; *Lewis v. Johns*, 34 Cal. 629; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Woodbridge v. Conner*, 49 Me. 353, 77 Am. Dec. 263; *Brown v. Perkins*, 1 Allen, 89; *Barden v. Felch*, 109 Mass. 154; *Johnson v. Barber*, 10 Ill. 425.

⁴⁵—*Page v. Freeman*, 19 Mo. 421; *Wright v. Lathrop*, 2 Ohio 33, 15 Am. Dec. 529; *Hawkins v. Hatton*, 1 N. & McC. 318, 9 Am. Dec. 700; *Knickerbacker v. Colver*, 8 Cow. 111; *Knott v. Cunningham*, 2 Sneed, 204; *McGehee v. Shafer*, 15 Texas, 198; *Turner v. Hitchcock*, 20 Iowa, 310; *Wheeler v.*

Worcester, 10 Allen, 591; *Henry v. Carlton*, 113 Ala. 636, 21 So. 225; *Grundell v. Union Iron Works*, 127 Cal. 438, 59 Pac. 826, 78 Am. St. Rep. 75, 47 L. R. A. 467; *Monat v. Wood*, 22 Colo., 404, 45 Pac. 389; *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553; *Roodhouse v. Christian*, 55 Ill. App. 107; *Lafeyth v. Emporia Nat. Bank*, 53 Kan. 51, 35 Pac. 805; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Allison v. Hobbs*, 96 Me. 26, 51 Atl. 245; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Monson v. Rouse*, 86 Mo. App. 37; *D. M. Osborne Co. v. Pino Mfg. Co.*, 51 Neb. 502, 70 N. W. 1124; '

because of the magistrate being liable for having issued it. And while in such cases the person injured may pursue all, so he may pursue any number of those who are legally chargeable with the wrong; if one is sued alone, it is no defense to him that others are not brought in to share the responsibility; if all are sued, one cannot excuse himself by showing the insignificance of his participation as compared with that of others.⁴⁶ The rules regarding remedies which are applied to breaches of contracts are obviously inapplicable here. When contracts are distinct, though they may be as intimately related as are contracts for the different classes of work on the same building, the breach of both cannot be re-

Stevens v. Smathers, 124 N. C. 571, 32 S. E. 959. A provocation received by one may be proved in mitigation of damages in an action against several defendants for a joint assault. *Davis v. Franke*, 33 Gratt. 413.

46—*Farebrother v. Ansley*, 1 Camp. 343; *Wilson v. Milner*, 2 Camp. 452; *Pitcher v. Bailey*, 8 East, 171; *Booth v. Hodgson*, 6 T. R. 405; *Merryweather v. Nixan*, 8 T. R. 186; *Vose v. Grant*, 15 Mass. 505; *Wheeler v. Worcester*, 10 Allen, 591; *Campbell v. Phelps*, 1 Pick. 62, 41 Am. Dec. 139; *Wilford v. Grant*, Kirby, 114; *Thweatt v. Jones*, 1 Rand. 328, 10 Am. Dec. 538; *Dupuy v. Johnson*, 1 Bibb, 562; *Acheson v. Miller*, 18 Ohio, 1; *Wallace v. Miller*, 15 La. Ann. 449; *Moore v. Appleton*, 26 Ala. 633; *Rhea v. White*, 3 Head, 121; *Murphy v. Wilson*, 44 Mo. 313, 100 Am. Dec. 290; *Silvers v. Nerdlinger*, 30 Ind. 53; *Bishop v. Ely*, 9 Johns. 294; *Williams v. Sheldon*, 10 Wend. 654; *Mayne v. Griswold*, 3 Sandf. 463; *Blanchard v. Burbank*, 16 Ill. App. 375; *Grundell v. Union Iron Works*, 127 Cal. 438, 59 Pac. 826, 78 Am. St. Rep. 75, 47 L. R. A. 467; *Roodhouse v.*

Christian, 55 Ill. App. 107; *West Chicago St. Ry. Co. v. Feldstein*, 69 Ill. App. 36; *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956; *McVey v. Manatt*, 80 Ia. 132, 45 N. W. 548; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Berkson v. Kansas City Cable Ry. Co.*, 144 Mo. 211, 45 S. W. 1119; *San Antonio Gas Co. v. Singleton*, 24 Tex. Civ. App. 341, 59 S. W. 920. The plaintiff may even bring different forms of action against the different participants in the wrong; as trespass against one, trover against another, and so on. *DuBose v. Marx*, 52 Ala. 506. When separate actions are brought for a joint trespass, plaintiff can recover against one or more though others be acquitted and if separate judgments are obtained he may make his election to take the larger judgment or pursue the solvent party and when made he is concluded. This is a privilege of which he cannot be deprived. He can have only one satisfaction but the judgment satisfied must be the one he has elected to take. *Power v. Baker*, 27 Fed. 396; *Roodhouse v. Christian*, 55 Ill. App. 107.

dressed in the same suit, because neither contractor is legally concerned with the conduct of the other, and to unite a controversy with each in one action would only breed confusion and difficulty, since the issues must be distinct, and separate results must be reached in the judgment. On the other hand, if two jointly undertake the work, it is the right of both to be made parties when complaint is made of non-performance; the other party has accepted their joint undertaking, and he cannot elect to separate in his suit those who have not consented to sever in their contract. The case of wrong-doers is wholly different; the party injured has not assented to their action; he has not agreed what the consequences shall be if one or more shall trespass upon his rights, nor is he morally under obligation to pursue his remedy in any particular form because of that form being most to their convenience. Whatever course is seemingly most for his interest, it is just that he should be at liberty to select.

Nor, after suit is brought, can there be any apportionment of responsibility, whether the suit be against one or against all. Each is responsible for the whole, and the degree of his blamableness as between himself and his associates is immaterial.⁴⁷ [*156] When the contributory action of all accomplishes a particular result, it is unimportant to the party injured that one contributed much to the injury and another little; the one

47—*West Chicago St. Ry. Co. v. Feldstein*, 69 Ill. App. 36. The huntsman who trespasses upon the plaintiff's grounds with his dogs, followed by a great number of people on foot and on horseback, who trample down and destroy crops, is responsible for the whole injury. *Hume v. Oldacre*, 1 Stark. 351. If action is brought against one of several wrong-doers, the judgment should be what the most culpable ought to pay, whether that defendant be that person or not. *Bell v. Morrison*, 27 Miss. 68. *Huddleston v. West Bellevue*,

111 Pa. St. 110. At least as to compensatory damages. *McCarthy v. De Armit*, 99 Pa. St. 63. In defending trespass to try title one may defend as to so much of the tract as he claims and disclaim as to the rest but, if instead of so doing, he with other defendants denies plaintiff's right to the whole tract and all the defendants are beaten, then he becomes liable jointly with his co-defendants and severally for the result of the trespass. *Walker v. Read*, 59 Tex. 187. In trespass against two or more there can be but one assessment

least guilty is liable for all, because he aided in accomplishing all.⁴⁸ Where one joint tortfeasor is sued he cannot compel the plaintiff to make the other parties,⁴⁹ or complain because they have not been joined.⁵⁰ And where two or more are sued one cannot complain because another has been dismissed out of court⁵¹ or been acquitted.⁵² Though two or more are sued and a joint tort alleged, the general rule is that a recovery may be had against one only.⁵³ But a different rule is held in Pennsylvania.⁵⁴

of damages, and it must be for the same amount against all who are found guilty. If a case for exemplary damages is made against one and not against the others, he may dismiss as to the latter and recover his exemplary damages against the former. *Pardridge v. Brady*, 7 Ill. App. 639. The rule as to this is otherwise in Pennsylvania. If punitive damages are sought, they must be assessed only as the most innocent defendant is liable for them. If he is not liable at all for such none should be given. *McCarthy v. De Armit*. 99 Pa. St. 63.

Plaintiff was entitled to the use of 400 inches of water in a stream. By the action of the several defendants independently he was deprived of the use of so much water. No one of them perhaps by his use of the water would have so reduced the amount as to injure plaintiff. *Held*, that they were jointly liable to him. *Hillman v. Newington*, 57 Cal. 56. So where water from defendant's roof negligently escaped with water from another source into plaintiff's cellar adjoining, the defendant is liable for the whole damage. *Slater v. Mersereau*, 64 N. Y. 138. But where several independently pollute a stream with sewage, each from his own prem-

ises, each is only liable for the damage he has done to a lower abutter, not each for all the damage done, distinguishing the case from one of direct injury from concurrent acts. *Chipman v. Palmer* 77 N. Y. 51, 33 Am. Rep. 566.

48—*Berry v. Fletcher*, 1 Dill. 67, 71. When a jury, in an action against several wrong-doers, return a verdict for a certain amount, and then proceed to apportion it among the defendants, this apportionment is a nullity. *Currier v. Swan*, 63 Me. 323.

49—*Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956.

50—*Berkson v. Kansas City Cable Ry. Co.*, 144 Mo. 211, 45 S. W. 1119; *Coleman v. Bennett*, 111 Tenn. 705, 69 S. W. 734.

51—*Sharpe v. Williams*, 41 Kan. 56, 20 Pac. 497.

52—*San Antonio Gas Co. v. Singleton*, 24 Tex. Civ. App. 341, 59 S. W. 920.

53—*Wallace v. Stevens*, 74 Tex. 559, 12 S. W. 283; *Wyss v. Grunert*, 108 Wis. 38, 83 N. W. 1095; *Atlantic, etc., R. R. Co. v. Laird*, 164 U. S. 393, 17 S. C. 720, 41 L. Ed. 485. In the last case it is held "that allegations alleging a joint relationship and the doing of negligent acts jointly are divisible, and that a recovery may be had

To charge one with participation in a wrong, it is generally essential that he should personally have contributed to it; but this, as has already been shown, may have been by advising or procuring it to be done, when he did not otherwise take part in it. In some cases, also, the ratification of the act is sufficient; and in all cases where one has obtained possession of the property of another without right, he is a wrong-doer in retaining it, irrespective of any questions regarding the liability of others. It was once held in Massachusetts that a sheriff who was not present when his deputy, in the service of a writ, committed a trespass, could not be held liable as a joint trespasser with him;⁵⁵ but the better doctrine is, that the sheriff, by construction of law, is always present with the deputy who bears his process, and is

where the proof establishes the connection of but one of the defendants with the acts averred." See also *Winslow v. Newlan*, 45 Ill. 145; *Carpenter v. Lee*, 5 Yerg. 265; *Swigart v. Graham*, 7 B. Mon. 661; *Tompkins v. Clay St. R. R. Co.*, 66 Cal. 163, 4 Pac. 1165.

54—*Wiest v. Electric Traction Co.*, 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666; *Rowland v. Philadelphia*, 202 Pa. St. 50, 51 Atl. 589; *Minnich v. Lancaster, etc., Ry. Co.*, 203 Pa. St. 632, 53 Atl. 501; *Sturzebecker v. Inland Traction Co.*, 211 Pa. St. 156. In the case first cited the court says: "It is not necessary to sue all the parties guilty of committing a tort; for joint wrong-doers are liable jointly and severally. And, when a joint suit is brought against a number of defendants, if the evidence shows that one of the parties was not connected with the tort, a verdict in a nonsuit as to him, is proper. A joint verdict may then be rendered against such of the defendants as are jointly liable. But, if no concert

of action is shown, and, therefore, no joint tort, and the case is one of separate tort or torts, upon the part of one or of several defendants, the action is not sustained and there should be no verdict against anyone. In a suit for a joint tort there should be no recovery upon proof of one or more separate torts. When a joint tort is charged, a joint tort must be proved, in order to sustain the action. The allegation and the proof must agree in cases of tort as in other cases." After reviewing cases the court concludes upon this point as follows: "We are of opinion that, when a plaintiff in an action of trespass to recover damages for negligence, declares for a joint tort, and the evidence shows no joint action by defendants, a verdict and judgment against one defendant for a separate tort should not be permitted." pp. 152-155; and see *St. Louis, etc., Co. v. Hopkins*, 100 Ill. App. 567.

55—*Campbell v. Phelps*, 1 Pick. 62, 41 Am. Dec. 139. See *Moulton v. Norton*, 5 Barb. 286.

legally responsible for his acts.⁵⁶ In New York, the officer who attached goods, the officer who took them from him on an execution in the attachment suit, and the plaintiff in that suit were all held responsible as joint wrong-doers.⁵⁷ In Iowa where an officer attached goods in favor of several plaintiffs, and by virtue of several writs, the plaintiffs in these writs, though present together at the time of the levy, were held not liable to a joint action, unless concert and co-operation between them was made out.⁵⁸ But this conclusion may well be doubted. In Massachusetts, where different creditors, acting separately and without concert, caused their creditor to be arrested on their several writs by the same officer, their joint liability was affirmed on reasons that seem conclusive.⁵⁹ In Alabama it is held that "if several creditors sue out, at different times, separate writs of attachment against a common debtor, and cause them to be simultaneously levied by the same officer, the levying being wrongful, they will be regarded as joint wrong-doers, though they may have acted separately, without concert, and each was endeavoring to secure a priority of lien."^{59a} And this view is sustained by the weight of authority.⁶⁰ But it is held that to maintain a joint liability

56—*Morgan v. Chester*, 4 Conn. 387; *King v. Orser*, 4 Duer, 431; *Waterbury v. Westervelt*, 9 N. Y. 598; *Balme v. Hutton*, 9 Bing. 471, 474.

57—*Sprague v. Kneeland*, 10 Wend. 161. If one sells and another buys goods, knowing of the claim of another, the latter may hold them jointly liable for a conversion. *Babcock v. Gill*, 10 Johns. 287.

58—*Eddy v. Howard*, 23 Iowa, 175; *Miller v. Beck*, 108 Ia. 575, 79 N. W. 344. "What each did was designed for his own interest, and the fact that they acted simultaneously, through the same attorneys and for the same reasons, did not make their acts joint." 108 Ia. p. 579. Compare *Ellis v. Howard*, 17 Vt. 330.

59—*Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727. BIGELOW, Ch. J., in delivering the opinion of the court, instances the case of the levy of several writs in favor of different parties on the same goods, by the same officer, as one in which a joint liability would be unquestionable. Where a sheriff wrongfully, while goods are in his possession under a previous wrongful levy, attaches them again, he and the attaching creditor are jointly liable. *Cox v. Hall*, 18 Vt. 191.

59a—*Harmon v. McRae*, 91 Ala. 401, 408, 8 So. 548; *Harris v. Russell*, 93 Ala. 59, 9 So. 541; *Vandiver v. Pollak*, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118.

60—*Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147; *Cole v.*

the writs must be levied at the same time on the same property by the same officer,⁶¹ and where the second writ was levied by the same officer on the same day, but later in the day, on the same and other goods and subject to the first levy, it was held [*157] there was no joint liability.⁶² Concert and co-operation may doubtless make a joint wrong of several acts not otherwise connected,⁶³ and which, without co-operation, could only be treated as independent trespasses.⁶⁴

When the suit is against several joint wrong-doers, the judgment must be for a single sum against all the parties found responsible.⁶⁵ As it may happen that this judgment may not be

Edwards, 52 Neb. 711, 72 N. W. 1045; Koch v. Peters, 97 Wis. 492, 73 N. W. 25.

61—Harris v. Russell, 93 Ala. 59, 9 So. 541.

62—Torey v. Schneider, 74 Tex. 116, 11 S. W. 1068.

63—See Higby v. Williams, 16 Johns. 215.

64—Of the necessity of co-operation in some form to constitute the joint wrong, see Bard v. Yohn, 26 Pa. St. 482. Mere presence is not sufficient. Berry v. Fletcher, 1 Dill. 67. Hilmes v. Stroebel, 59 Wis. 74; Blue v. Christ, 4 Ill. App. 351. A mere purchaser at a sale by the officer who receives from him immediate possession is not responsible in trespass. His purchase does not of itself make him a participant in the wrongful seizure, and he is not made a trespasser by relation. He and the officer are not jointly liable for a wrongful seizure. Gloss v. Black, 91 Pa. St. 418. For two separate injuries, one committed by one party and one by another, there is no joint liability. Hines v. Jarrett, 26 S. C. 480, 2 S. E. Rep. 393; Cooper v. Blair, 14 Ore. 255. See Ray v. Light, 34 Ark.

421. A brakeman put a young lad on a train, prevented his getting off till the train had gone some miles. If the conductor was present directing and consenting to the brakeman's act, they were joint trespassers. If he was not present so directing but afterward knowing of it refused to stop the train, he was himself a trespasser, but not jointly with the brakeman. "When two or more commit separate trespasses, there is no joint liability." Drake v. Kiely, 93 Pa. St. 492.

65—Nashville, etc., Ry. Co. v. Jones, 100 Tenn. 512, 45 S. W. 681. In a suit for malicious prosecution against two defendants there was a verdict against both for \$5,000. A new trial was granted as to one defendant and subsequently a verdict rendered against him for \$3,000. A judgment was entered on each verdict and the practice would seem to have been approved. Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31. In South Carolina, at an early day, the practice of apportioning damages among wrong-doers, by the verdict, appears to have been sanctioned and established. Smith

against all the parties liable, either because the plaintiff was not at first aware of the full extent of the combination which has injured him, or because he was unable, when first suing, to obtain service on all the parties connected with it, it becomes a question of importance whether, after thus proceeding against a part, he may afterwards sue others. And the question is the same if, having voluntarily elected to pursue a part only, he finds, after obtaining judgment, that the pecuniary responsibility is not what he had supposed.

Whatever may have been the reason for proceeding at first against less than the whole, it is conceded on all sides that a previous suit against one or more is no bar to a new suit against the *others, even though the first suit be pending, [*158] or have proceeded to judgment when the second is brought.

The second, or even a subsequent suit may proceed until a stage has been reached in some one of them at which the plaintiff is deemed in law to have either received satisfaction, or to have elected to rely upon one proceeding for his remedy to the abandonment of the others.

But the authorities are not agreed as to what that stage is. The rule laid down in *Brown v. Wootton* is that a recovery and judgment in a suit against one wrong-doer is a bar to any further action against others. The action was trover for the conversion of certain plate. The defendant pleaded that the plaintiff had theretofore brought suit for the same conversion against one J. S., and had recovered judgment in that suit, and taken that body for execution. "All the court held the plea to be good, for the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced *in rem judicatum* and to certainty, which takes

v. Singleton, 2 McM. 184, 39 Am. Dec. 122. But see *Berry v. Fletcher*, 1 Dill. 67. The fact that the liability of some is limited does not prevent a judgment for the full amount of damages suffered against others. *Grundell v. Union Iron Works*, 127 Cal. 438, 59 Pac. 826, 78 Am. St. Rep. 75, 47 L. R. A. 467.

away the action against the others; and therefore POPHAM said: If one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other, and the alleging that he hath the one in execution for this cause is not an answer to the purpose; and the difference between this case and the case of debt upon an obligation against two, is because there every one is chargeable and liable to the entire debt, and therefore a recovery against one is not a bar against the other until satisfaction. FENNER said: That in case of trespass, after the judgment given, the property of the goods is changed, so as he may not seize them again. Wherefore, by all the court *nullo contradicanti*, nor any of the defendant's counsel being there, it was adjudged for the defendant.''⁶⁶

This case has been followed in England,⁶⁷ but, except [*159] in Vir*ginia⁶⁸ and Rhode Island,⁶⁹ it has not met with favor in this country. It was expressly disapproved by the Supreme Court of New York, when presided over by Chief Justice KENT, and was pronounced by him to be a departure from the earlier English decisions.⁷⁰ The rule laid down by that eminent jurist, and which has since been generally followed in this country, is, that the party injured may bring separate suits against the wrong-doers, and proceed to judgment in each; and that no bar arises as to any of them until satisfaction is

66—Brown v. Wootton, Cro. Jac. 73; Yelv. 67.

67—Buckland v. Johnson, 15 C. B. 145; King v. Hoare, 13 M. & W. 494, 504; Brinsmead v. Harrison, L. R. 6 C. P. 584. See Adams v. Ham, 5 U. C. Q. B. 292; Sloan v. Creasor, 22 U. C. Q. B. 127.

68—Wilkes v. Jackson, 2 H. & M. 355.

69—Hunt v. Bates, 7 R. I. 217, 8 Am. Dec. 597. A town being liable by statute for negligently leaving in a highway objects tending to frighten horses, and an in-

dividual for the same matter being liable at common law, they are not joint tort feorsors, so that if a judgment recovered against the latter has been proved against his bankrupt estate, the injured person is not estopped from pursuing the town. He may look to either till indemnified. Bennett v. Fifield, 13 R. I. 139, 43 Am. Rep. 17.

70—Livingston v. Bishop, 1 Johns. 290, followed Knickerbacker v. Colver, 8 Cow. 111.

received.⁷¹ In Tennessee it is agreed that a judgment against one joint wrong-doer is not of itself a bar to suits against the others; but it is said that "the more reasonable doctrine, on the other hand, is, that as each of the wrong-doers is liable for his own act, separate actions may be brought at the same time, or successively, against each of the several trespassers, in each of which the plaintiff may proceed to judgment. But as he can claim or enforce only one satisfaction for the same injury, he must elect against which of the several he will proceed to execution for the satisfaction of his damages. If the several assessments vary in amount, he may elect to take the larger sum, or, if the defendants be not all solvent, he may elect to proceed against the solvent party. And such election, followed by actual satisfaction of that particular judgment, will preclude the plaintiff from proceeding against either of the other defendants upon the judgments recovered against them, except for the costs of [*160] the respective cases, which he may enforce the collection of by execution."⁷² In some other States it is held that when execution is taken out by the plaintiff on one judgment, he has

71—*New York*: *Livingston v. Bishop*, 1 Johns. 290. *Kentucky*: *Elliott v. Porter*, 5 Dana, 299, 30 Am. Dec. 689; *Sharp v. Gray*, 5 B. Mon. 4; *United Society v. Underwood*, 11 Bush, 265, 21 Am. Rep. 214. *Massachusetts*: *Elliott v. Hayden*, 104 Mass. 180; *Knight v. Nelson*, 117 Mass. 458. See *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; *Brown v. Cambridge*, 3 Allen, 474. *West Virginia*: *Griffie v. McClung*, 5 W. Va. 131. *Connecticut*: *Morgan v. Chester*, 4 Conn. 387; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Rep. 154. *Ohio*: *Wright v. Lathrop*, 2 Ohio, 33, 15 Am. Dec. 529. *Vermont*: *Sander-son v. Caldwell*, 2 Aik. 195; *Stewart v. Martin*, 16 Vt. 397. *Iowa*: *Turner v. Hitchcock*, 20 Iowa, 310; *Cushing v. Hederman*, 117 Ia. 637,

91 N. W. 940, 94 Am. St. Rep. 320. *Texas*: *McGehee v. Shafer*, 15 Texas, 198. *Illinois*: *Union, etc., Co. v. Shacklett*, 19 Ill. App. 145; *Roodhouse v. Christian*, 158 Ill. 137, 41 N. E. 748. *California*: *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31. *Maine*: *Cleveland v. Bangor*, 87 Me. 259, 32 Atl. 892.

72—*Knott v. Cunningham*, 2 Sneed, 204, 210. This is a little blind, but the inference from it seems warranted, that if execution on one judgment proves unavailable, it may be returned, and one taken out on another. The earlier case of *Christian v. Hoover*, 6 Yerg. 505, is in accord with the New York cases and the general current of American authority.

thereby made his final election. "Hence, a final judgment and an execution, or an order for an execution against one of several joint trespassers is a discharge of all the others."⁷³

The doctrine which prevails in the majority of the States has met with the approval of the federal courts,⁷⁴ and there seems to be no good reason why it should not be generally accepted and followed.⁷⁵ And where two persons are severally, though not jointly liable for the same tort, a judgment against one is no bar to a suit against the other.^{75a}

Enforcing satisfaction of his damages by the collection of one judgment, will not preclude the plaintiff from collecting his costs in other judgments. He is entitled to take out executions for their collection.⁷⁶ A partial satisfaction of a judgment against one joint wrong-doer is no bar to a suit against another.⁷⁷ It, of course, follows from the foregoing that, where there are several judgments, the payment or satisfaction of one discharges all.⁷⁸

It is to be observed in respect to the point above considered,

73—*Indiana*: *Allen v. Wheatley*, 3 Blackf. 332; approved in *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711. *Maine*: *White v. Philbrick*, 5 Me. 147, 17 Am. Dec. 214. *Alabama*: *Golding v. Hall*, 9 Port. 169; *Blann v. Crocheron*, 20 Ala. 320. *Missouri*: *Page v. Freeman*, 19 Mo. 421. *Michigan*: *Boardman v. Acer*, 13 Mich. 77. Compare *Brady v. Whitney*, 24 Mich. 154; *Kenyon v. Woodruff*, 33 Mich. 310. If judgment is taken against one alone, tender of payment upon that is no bar, unless the plaintiff elects to receive it. *Blann v. Crocheron*, 20 Ala. 320.

74—*Murray v. Lovejoy*, 2 Cliff. 191; S. C. 3 Wal. 1.

75—Perhaps if a levy on chattels has been made, sufficient to satisfy the judgment, that should at least suspend all further remedy for the time. See *Kenyon v. Woodruff*, 33 Mich. 310; *F. & M.*

Bank v. Kingsley, 2 Doug. (Mich.) 379; *Freeman on Judgments*, § 475, and cases cited.

75a—*Cleveland v. Bangor*, 87 Me. 259, 32 Atl. 892.

76—*Windham v. Wither*, Stra. 515; *Livingston v. Bishop*, 1 Johns. 290, 293; *Knickerbacker v. Colver*, 8 Cow. 111; *First Nat. Bank v. Piano Co.*, 45 Ind. 5; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Rep. 154. See *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689. In a joint action for libel several judgments were rendered. The smaller judgment was paid. Upon payment of costs the other defendant was entitled to have the judgment against him satisfied. *Breslin v. Peck*, 38 Hun, 623.

77—*McVey v. Manatt*, 80 Ia. 132, 45 N. W. 548.

78—*Ashcraft v. Knoblock*, 146 Ind. 169, 45 N. E. 69; *Snyder v. Witt*, 99 Tenn. 618, 42 S. W. 441.

where the bar accrues in favor of some of the wrong-doers by reason of what has been received from or done in respect to one or more others, that the bar arises not from any particular form *that the proceeding assumes, but from the [*161] fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar to all.⁷⁹ And so a release of one releases all,⁸⁰ although the release

79—*Chetwood v. Cal. Nat. Bank*, 113 Cal. 414, 45 Pac. 704; *Bowman v. Davis*, 13 Colo. 297, 22 Pac. 507; *Seither v. Phila. Traction Co.*, 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54; *Turner v. Hitchcock*, 20 Iowa, 310; *Tompkins v. Clay St. R. R. Co.*, 66 Cal. 164; *Urton v. Price*, 57 Cal. 270; *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689. Note taken from one, but not paid, is no satisfaction. *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Rep. 154, lays down the general rule. See *Allison v. Connor*, 36 Mich. 283; *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Bronson v. Fitzhugh*, 1 Hill, 185. A partial satisfaction by one is admissible in mitigation of damages sought to be recovered against another. *Knapp v. Roche*, 94 N. Y. 329. In trover against two, after judgment against one and for the other defendant, plaintiff discontinued as to the former by unsealed agreement and sued the other again. *Held*, that the discontinuance was no bar. Nothing less than a satisfaction operates as a discharge. "Neither recovery of judgment unsatisfied in whole or in part, nor release of one on receipt of partial satisfaction,

where it is expressed in the release that the sum paid is received only in part satisfaction, operates as a bar." *Sloan v. Herrick*, 49 Vt. 327. "When a technical release under seal, importing consideration, is given, it is a bar to further action. If the contract is not one from which the law deems conclusively that the injured party has been satisfied for the wrong done, then a question of fact arises whether what has been received is in full. If not, it is only a satisfaction *pro tanto* against another. This doctrine is sustained by the weight of authority in all cases where the amount of the demand is capable of proof and computation, though there is a conflict where damages are mainly in the discretion of the jury as in case of assault." This held in a case where an agreement unsealed for \$200 was given in release of one, and was held only a release *pro tanto* against the other. *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830. Where a convict in the penitentiary received injuries while employed by contractors, under charge of the penitentiary officers, and he presented to the legislature a petition for relief, and a sum was granted to and received by him: *Held*, that

expressly stipulates that the other defendants shall not be released.⁸¹ And this rule is held to apply even though the one released was not in fact liable.⁸² "It does not lie in the mouth of

this was a bar to any suit against the contractors, as the relief received from the State implied that the State was a joint wrong-doer. *Metz v. Soule*, 40 Iowa, 236. Plaintiff sued H. for libel for publishing three articles in a paper. Two other articles were published in the same paper. He sued defendants for publishing the five, the first three being the same as those covered by the suit against H. After judgment against H. had been paid, defendants moved to vacate the judgment against them. *Held*, that the plaintiff suffered more than a single injury; that the publication twice by defendants alone of the matter previously published by them and H. jointly was a new and distinct injury; that so much of the verdict as was based on those publications was not satisfied by the payment of the judgment against H. *Woods v. Pangburn*, 75 N. Y. 495.

80—*Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. 170; *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 102 Am. St. Rep. 416; *Sunlin v. Skutt*, 133 Mich. 208, 94 N. W. 733; *Hubbard v. St. Louis, etc., R. R. Co.*, 173 Mo. 249, 72 S. W. 1073; *Seither v. Phila. Traction Co.*, 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54; *Williams v. Le Bar*, 141 Pa. St. 149, 21 Atl. 525; *McGehee v. Shafer*, 15 Tex. 193. But in *Louisville, etc., Mail Co. v. Barnes*, 117 Ky. 860, it is held that a release of one upon receiving a partial satisfaction from him is no bar to a suit against the others.

81—*Mitchell v. Allen*, 25 Hun, 542; *Seither v. Phila. Traction Co.*, 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54; *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 102 Am. St. Rep. 416. In the last case the following release of two defendants was held a bar to the prosecution of the suit against the other defendants: "Whereas James H. Moore and Enoch W. Wiggins, are desirous of settling for their own individual liability, and to be therefore released from any further liability as to themselves personally; and they having paid to me the sum of \$1,507.68, to be applied upon my claim for damages in this cause, I do hereby release the said Moore and Wiggins from all further liability, but reserving distinctively and expressly all my rights and claims against each and all of the other defendants for any and all sums, in addition to the sum above paid, which I may be found entitled to. In other words, it is distinctly understood that no rights whatsoever are released as against the other defendants, and that the only benefit they may or shall receive by reason hereof is such as is allowed by law in giving to them the benefit of the sum above paid by way of reduction *pro tanto*, of the damages for which this suit was brought."

82—*Miller v. Beck*, 108 Ia. 575, 79 N. W. 344; *Hubbard v. St. Louis, etc., R. R. Co.*, 173 Mo. 249, 72 S. W. 1073; *Seither v. Phila. Traction Co.*, 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4

such a plaintiff to say he had no cause of action against one who paid him for his injuries, for the law presumes that the one who paid committed the trespass and occasioned the whole injury.''⁸³ But an acceptance of money or other consideration from one joint tortfeasor is not a discharge of the others, where there is no satisfaction or release.⁸⁴ Nor is a mere agreement not to sue, though given for a valuable consideration.^{84a} In an Illinois case, where such an agreement was made with one defendant and the suit was dismissed as to him, the court says: "A release to one of several joint tortfeasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. Here, there is no claim of a technical release under seal. The pending suit against Le Cardi was dismissed, and a written agreement was signed that no action should be begun against Le Cardi by appellee. This, on its face, was simply an agreement or covenant not to sue. The legal effect of such a covenant is not the same as that of a release. A covenant not to sue a sole tortfeasor is, to avoid circuity of action, considered in law a discharge, and a bar to an action against such tortfeasor. But the rule is otherwise where there are two or more tortfeasors, and the covenant is with one of them not to sue him. In such case the covenant does not operate as a release of either the covenantee or the other tortfeasors, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to the action against them.''⁸⁵ It is also held in the same case

L. R. A. 54. But in *Thomas v. Central R. R. Co.*, 194 Pa. St. 511, 45 Atl. 344, it is held, without referring to the preceding case, or citing any authority, that a release of one who is not liable is not a release of one who is.

83—*Hubbard v. St. Louis, etc., R. R. Co.*, 173 Mo. 249, 72 S. W. 1073.

84—*Chicago, etc., R. R. Co. v. Hines*, 82 Ill. App. 488.

84a—*Robertson v. Trammell*, 98 Tex. 364.

85—*Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271, citing *Snow v. Chandler*, 10 N. H. 92; *Knapp v. Roche*, 94 N. Y. 329; *Bloss v. Plymale*, 3 W. Va. 393; *Sloan v. Herrick*, 49 Vt. 327; *Brown v. Marsh*, 7 Vt. 320; *Chamberlain v. Murphy*, 41 Vt. 110; *Ellis v. Esson*, 50 Wis. 138; *Parmelee v. Lawrence*, 44 Ill. 405. In *Chicago v. Babcock* the agreement in question was as follows: "It is hereby agreed that no action shall be begun against Joseph Le Cardi, by reason of any

that whether there was an accord and satisfaction was a question of fact. It has been decided in Indiana that where the wrong consisted in the conversion by two of certain specific items [*162] of prop*erty, it was competent to settle with one on his returning a part of what had been taken, and to proceed afterward against the other.⁸⁶ The decision was expressly confined to the specific facts, and could not safely be carried very far. But where property has been converted, a settlement in respect to a part of it is no bar to a suit for the conversion of the remainder.⁸⁷

The foregoing rules in regard to the effect of a judgment against one joint tortfeasor, or of a release or satisfaction to one, are held to apply equally where two or more are severally, though not jointly, liable for the same tort.⁸⁸

2. Wrongs not Intended. Passing now to the class of unintended wrongs, we find them to consist most commonly in the neglect to perform some duty which the party has assumed by contract, or which the law has imposed because of official position or of some special relation. In such cases several persons may be found blamable, but it does not follow that all can be held liable to the party wronged. The rule is general in such cases, that the legal wrong is chargeable only to the party who, by his contract, assumed the duty, or upon whom the law imposed it; in other words, as the breach of duty constitutes the wrong, the person who in legal contemplation, is wrong-doer is the person who was burdened with the duty, and who has failed in its per-

matters existing at this date, by the undersigned. Given for good consideration."

86—*Fitzgerald v. Smith*, 1 Ind. 310.

87—*McCrills v. Hawes*, 38 Me. 566; citing *Benbridge v. Day*, 1 Salk. 218. There are statutes in some States which permit parties to settle with one or more who are jointly liable to them, without discharging the others. Settlement with one not liable was held,

in *Turner v. Hitchcock*, 20 Iowa, 310, not to bar suits against those who were. Citing *Wilson v. Reed*, 3 Johns. 175.

88—*Miller v. Beck*, 108 Ia. 575, 79 N. W. 344; *Cleveland v. Bangor*, 87 Me. 259, 32 Atl. 892. In the last case the court says: "But with regard to the joint liability under consideration, no sound reason has been given, and it is believed that none can be assigned for such a distinction between the

formance.⁸⁹ The exceptions to the rule must be of those cases in which the act or omission constitutes in itself a positive wrong, independent of any conventional or statutory duty; in which case the party chargeable with it may be held liable, whether subject to the conventional or statutory duty or not. An illustration may, perhaps, make this point sufficiently plain.

A common carrier undertakes for the transportation of goods *from the Mississippi to the seaboard. His duty [*163] by law is to carry safely and deliver within a reasonable time, and if he fails to do so he can only excuse himself by showing that the delays or injuries have resulted from the act of God or of the public enemy. Let it be supposed that the servants of the carrier are negligent in the performance of their tasks; they do not load the goods promptly, or they delay trains unreasonably on the road, and in consequence, when the goods reach their destination, an advantageous market that should have been secured is lost. On these facts it is plain that there has been a breach of the duty owing to the consignor; and a breach, too, for which the servants of the carrier are blamable. But when we proceed to inquire whose duty has not been observed, it is equally plain that it is not that of the servant, for with him the consignor had entered into no relations whatever. The servant owes duties to the carrier, his master, by whom he may be called to account for his negligence; but no third party by whom he has not been employed, can presume to hold him to responsibility

case of wrong-doers who are jointly and severally liable and of those who are only severally liable for the same injury. In either case the sufferer is entitled to but one compensation for the same injury, and full satisfaction from one will operate as a discharge of the others. In neither case will anything short of satisfaction from one bar a suit against another." pp. 264-5. And see *Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. 170.

89—In an action of tort for malpractice growing out of a contract

for professional services of a firm of physicians, only the negligent partner was sued. *Held*, that as the gist of the action was the breach of the contract, all persons jointly liable on the contract must be joined. *Whittaker v. Collins*, 34 Minn. 299, 57 Am. Rep. 55. But where the gist is negligence on the part of the occupants of a building in leaving an elevator shaft unprotected, the non-joinder of one is immaterial. *Fisher v. Cook*, 125 Ill. 280, 17 N. E. 763.

for unfaithful service. The consignor must, therefore, find his remedy against the party he employed, and the latter, if he has trusted to negligent servants, must assume the responsibility.⁹⁰

The case supposed is one of mere neglect to do with legal promptness what duty required the master to do or have done. On the other hand, if the servant by some distinct and positive wrongful act shall destroy or injure the goods, there is in contemplation of law a wrong not only by the master but by the servant also: by the master, because his conventional duty to carry and deliver safely the goods entrusted to him has failed in performance, and by the servant because, while the wrong done by him is a breach of his contract relations with the master, it would equally be a wrong to the owner of the goods if no such contract relations existed. In making out a cause of action it might be necessary to show the duty in order to bring the responsibility home to the party who was not an active participant in the injury; but whoever was personally instrumental would be responsible, whether he had assumed any conventional duty or not. The obligation to abstain from positive wrongs rests upon every one, and does not depend upon contracts or other circumstances.

A similar illustration may be drawn from the class of [*164] duties *springing from the ownership of lands. One may have upon his lands an excavation, which leaves the land of his neighbor without sufficient collateral support. If the land in this condition is left in charge of his servant, who understands the danger to the neighbor's interests, he ought, perhaps, considering the question as one of moral obligation, to take such steps as would prevent the threatened injury; but the legal duty to do so is imposed not on him, but on his master, and the master alone can be looked to, in case injury should occur. But if the servant himself, in the absence of the master, were to dig the pit, his personal responsibility for the resulting injury might be insisted upon. The distinction here is between an injury which might have been avoided by active steps which the law did not require of the servant, and an injury which his negligence has caused. Negligence is always unlawful.⁹¹

90—Shearm. & Redf. on Neg.,
§ 111.

91—Richardson v. Kimball, 28
Me. 463. A. owned a boiler and

The case of carriers of persons is a conspicuous instance in which the failure of a servant to observe due care may constitute a legal wrong to third parties, and render him and his master jointly responsible. In undertaking to carry, the carrier assumes the duty to carry safely, so far as the highest vigilance will enable him to do so. A railroad company, acting as such carrier, employs an engineer, whose duty to the company is to run the train with skill and prudence. Now, although there are no contract relations between the engineer and the person who is to be carried, yet, when an individual is placed in a position of responsibility, and the property, and especially the persons of others, are entrusted to his prudence, his skill, and his fidelity, so that his negligence may inflict serious, and, perhaps, irreparable injury, it is reasonable that the law should make it the right of every person thus circumstanced to demand from him a vigilance corresponding to the responsibility. And this we understand to be the rule.⁹² The negligence in such cases is that of both master and *servant, and the liability, as in other cases [*165] where two or more are chargeable with a wrong, may be enforced in a suit against one or against both.⁹³ The joint lia-

ran a saw mill. B. and C. entered into partnership with him to build and run a grist mill, using A.'s boiler certain days in the week. On the other days A. used it to run his saw mill. On one of these latter it exploded. B. and C. owned a quarter interest in the boiler. *Held*, B. and C. were not liable for the injury caused by the explosion. *Young v. Bransford*, 12 Lea, 232.

92—*Hutchinson v. York, etc. R. R. Co.*, 5 Exch. 343, 350, per ALDERSON, B.; *McMillan v. Saratoga, etc. R. R. Co.*, 20 Barb. 449, 454, per ALLEN, Ch. J. See *Shearm. & Redf. on Neg.* §§ 112, 115.

93—*Cary v. Webster*, 1 Str. 480; *Wilson v. Peto*, 6 Moore, 47; *Johnson v. Barber*, 10 Ill. 425; *Carman v. Steubenville, etc., R. R. Co.*, 4

Ohio St. 399; *Suydam v. Moore*, 8 Barb. 358, 363; *Bailey v. Bailey*, 61 Me. 361; *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; *Montfort v. Hughes*, 3 E. D. Smith, 591. Perhaps the courts of Massachusetts would not sustain a joint liability, unless the master was present and participating. See *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745. In New York the doctrine of the text is considered unquestionable. See *Phelps v. Wait*, 30 N. Y. 78. Defendant furnished horses and wagon and another man drove them to carry passengers for him. They divided the money so earned. The driver in the absence of defendant negligently ran over the plaintiff. Defendant held liable for the negli-

bility would seem to be still plainer where the servant is guilty of a positive act of misfeasance to the property or person being carried. When a train conductor puts a man off the cars without justification, or commits an assault on a passenger in the cars, or runs his train past a station where passengers are to be left, or is guilty of any other misconduct of a like nature, the person injured is under no obligation to look beyond him for redress. Nevertheless, he may, at his option, unite the railroad company as a defendant, or sue it separately.⁹⁴ And in the case of carriers of persons, the obligation not to expose life or limb to injury by negligence is one which is independent of contract relations, and exists, whether a consideration has been received for the carriage or not. The duty to carry safely one who is received for carriage is a public duty, and a contract or the payment of fare is not necessary to create it.⁹⁵ This is the rule which has been applied

to railroad companies, and it should be the rule governing [*166] *individuals who are not common carriers. If a person volunteers, through himself or his servants, to transport others by modes or under circumstances calculated to expose them to danger, he should be held to assume the duty of care in so doing, and the duty to make compensation, in case he should become the instrument of a negligent injury to his charge.

gence of his associate in the common enterprise. *Stroher v. Elting*, 97 N. Y. 102. The Massachusetts doctrine was followed in *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503.

94—*Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Burnham v. Grand Trunk R. R. Co.*, 63 Me. 298, 18 Am. Rep. 220; *Priest v. Hudson Riv. R. R. Co.*, 40 How. Pr. 456; *Coleman v. N. Y. & N. H. R. R. Co.*, 106 Mass. 160; *Redding v. South Carolina R. R. Co.*, 3 S. C. Rep. 1, 16 Am. Rep. 681; *Baltimore, etc., R. R. Co. v. Blocher*, 27 Md. 277; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465,

64 Am. Dec. 83; *Pennsylvania R. R. Co. v. Vandiver*, 42 Pa. 365, 82 Am. Rep. 520; *Brokaw v. New Jersey R. R. Co.*, 32 N. J. 328, 90 Am. Dec. 659; *Kline v. Central Pacific R. R. Co.*, 39 Cal. 587; *Central of Georgia Ry. Co. v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250.

95—*Nolton v. Western R. R. Co.*, 15 N. Y. 444, 69 Am. Dec. 623; *Derby v. Reading R. R. Co.*, 14 How. 468; *Jacobus v. St. Paul R. R. Co.*, 20 Minn. 125, 18 Am. Rep. 360; *Marshall v. York, etc., Railway Co.*, 11 C. B. 655. See cases Ch. XX, page *642.

The case of a libel in a newspaper may give us a further illustration of joint and several liability for a tort. A libel may be written by a subordinate and published in the paper without the knowledge of the proprietor, but the proprietor will nevertheless be responsible, though the publication may have been entirely against his desire, and offensive to him when brought to his knowledge. The publication of the paper is in law his act, whether managed by him in person or intrusted to agents; and if he fails to exclude libelous matter he fails in that supervision of his own business which is due to the public, and he cannot excuse himself by showing that he did not authorize a wrong which it was his duty to guard against and render impossible.⁹⁶ But the subordinate is responsible also, because he, like every other person, is under obligation at all times and in all positions to abstain from inflicting the injury of defamation. A joint action does not lie against two or more for slander "because the words of one are not the words of another. The act of each constitutes an entire and distinct offense."^{96a}

A corporation has been held responsible to persons to whom its agent, acting within the apparent scope of his powers, had issued fraudulent certificates of stock, whereby they were defrauded.⁹⁷ The responsibility of both principals and agent here would seem unquestionable, the agent being the active wrongdoer and the principal responsible for his acts.

96—*Dunn v. Hall*, 1 Ind. 344; *Buckley v. Knapp*, 48 Mo. 152; *Perrett v. Times Newspaper*, 25 La. Ann. 170; *Dole v. Lyon*, 10 Johns. 446, 6 Am. Dec. 346; *Wilson v. Noonan*, 27 Wis. 598; *Danville Press Co. v. Harrison*, 99 Ill. App. 244.

96a—*Blake v. Smith*, 19 R. I. 476, 478, 34 Atl. 995.

97—*New York & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 593; *Same v. Same*, 34 N. Y. 30. See *Bridgeport Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn. 231. From failure to keep

a highway in repair whereby injury is suffered, one highway commissioner may be liable, although the negligence is that of three commissioners. Not being a corporation, there is no reason for making an exception to the general rule that any one of several wrong doers may be sued. *Babcock v. Gifford*, 29 Hun, 186. Distinguishing *Bassett v. Fish*, 75 N. Y. 303, where school trustees were held not individually liable for negligence because they were a body corporate.

What Constitutes a Joint Wrong or Joint Liability. All who actively participate in any manner in the commission of a tort, or who command, direct, advise, encourage, aid or abet its commission, are jointly and severally liable therefor.⁹⁸ "All who aid, advise, command or countenance the commission of a tort by another, or who approve of it after it is done, are liable, if done for their benefit, in the same manner as if they had done the act with their own hands; and proof that a person is present at the commission of a trespass without disapproving or approving of it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it; and was thereby aiding or abetting the same."⁹⁹ "One who in any manner indicates his desire that an act be done, may be said to request it; and who does anything in furtherance of an act may be said to aid or abet it."¹ It is never any defense to an action of tort that the defendant acted at the request or as agent of another.^{1a} "The capacity in which a tortfeasor acts, whether as agent, trus-

98—*Henry v. Carlton*, 113 Ala. 636, 21 So. 225; *Monat v. Wood*, 22 Colo. 404, 45 Pac. 389; *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553; *MacVeagh v. Hanford*, 29 Ill. App. 606; *Cleveland v. Stillwell*, 75 Ia. 466, 39 N. W. 711; *Sharpe v. Williams*, 41 Kan. 56, 20 Pac. 497; *Chicago, etc., R. R. Co. v. Watkins*, 43 Kan. 50, 22 Pac. 985; *Lafeyth v. Emporia Nat. Bank*, 53 Kan. 51, 35 Pac. 805; *Bright v. Bell*, 113 La. 1078, 37 So. 976; *Martin v. Golden*, 180 Mass. 549, 62 N. E. 977; *Monson v. Rouse*, 86 Mo. App. 97; *D. M. Osborne Co. v. Pino Mfg. Co.*, 51 Neb. 502, 70 N. W. 1124; *Carson v. Dessau*, 142 N. Y. 445, 37 N. E. 493; *Stephens v. Smathers*, 124 N. C. 571, 32 S. E. 959; *Wm. G. Rogers Co. v. International Silver Co.*, 118 Fed. 133, 55 C. C. A. 83. Where

one defendant wrongfully arrested the plaintiff and took her to a lockup where she was detained by the other defendant, it was held that the two were jointly liable, but that the joint liability extended only to the time after the plaintiff was locked up. *Martin v. Golden*, 180 Mass. 549, 62 N. E. 977.

99—*Mack v. Kelsey*, 61 Vt. 399, 401, 402, 17 Atl. 780.

1—*Donovan v. Consolidated Coal Co.*, 88 Ill. App. 589, 597. Here it was held that one who grants the right to mine coal which he has no right to do is liable for the trespass by the grantee.

1a—*Blue v. Briggs*, 12 Ind. App. 105, 39 N. E. 885; *Burns v. Kirkpatrick*, 91 Mich. 364, 51 N. W. 893, 30 Am. St. Rep. 485.

tee, servant or public officer, does not protect him from liability for his torts."^{1b}

Where the plaintiff was arrested by the same officer at the same time on two tax warrants, issued by different boards of assessors for different years, it was held that the members of the two boards were jointly liable for the arrest.² In another case *G*, one of the defendants, seduced the plaintiff and continued to have sexual intercourse with her for a period of three years, during which the plaintiff became twice pregnant. *K*, a physician, at the instance of *G* and for the purpose of concealing the wrong, procured two abortions upon the plaintiff. It was held that the successive acts constituted but one wrong and that both were jointly liable for the entire damages.³ "If each had acted independently," says the court, "the plaintiff might have been compelled to pursue

1b—*Warden-Bushnell & Glessner Co. v. Harris*, 81 Ia. 153, 46 N. W. 859.

2—*Allison v. Hobbs*, 96 Me. 26, 51 Atl. 245. The court says: "Moreover, these defendants and the assessors for the year 1897, provided the plaintiff was also illegally arrested on their warrant by the same officer and at the same time, were joint trespassers, although each board of assessors acted independently of each other and neither had knowledge that the plaintiff was to be arrested upon the warrant of the other. The plaintiff in fact suffered only one wrong, his illegal arrest and detention by the one person acting under the authority of the two boards of assessors. The trespasses on the person of the plaintiff were simultaneous and contemporaneous acts committed on him by the same person acting at the same time for each of these boards of assessors, and the assessors for both of these years,

upon whose warrants the plaintiff was simultaneously arrested, were joint tort feasers. * * * Again, while it is true that persons who act separately and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment, yet if such persons acting independently, by their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, they are then joint tort feasers within the rule, and may be sued either jointly or severally at the election of the plaintiff, and in such an action against one or more the whole damage may be recovered." pp. 28, 29.

3—*Gunder v. Tibbits*, 153 Ind. 591, 55 N. E. 762. It was held to be immaterial that *K* did not know that *G* seduced the plaintiff.

them separately, although the consequences of their acts united. But Kimball was the hand of Gunder in furthering Gunder's wrong. The consequences of the operation were intentionally intermingled by Kimball with the natural consequences of Gunder's sexual intercourse with plaintiff. When Gunder came to Kimball, the incident was not closed; and Kimball willingly joined in and helped on a wrong that was not completed,—a wrong that constituted, when completed, but one cause of action against Gunder. And so, if Kimball chose to come in at any stage, he too is liable for the whole; for the law will not undertake to apportion the damages in such cases."

In respect to negligent injuries, there is considerable difference of opinion as to what constitutes joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities.⁴ The authorities are, perhaps, not agreed beyond

4—The following are some of the more recent cases in which the question has been especially considered: *Richmond, etc., R. R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495; *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; *Cleveland v. Bangor*, 87 Me. 259, 32 Atl. 892; *Matthews v. Delaware, etc., R. R. Co.*, 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261; *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676; *Wiest v. Electric Traction Co.*, 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666; *Swain v. Tenn. Copper Co.*, 111 Tenn. 430, 78 S. W. 93. In the last case the court says: "When a tort is committed by two or more jointly, by force directly applied, or in the pursuit of a common purpose or design, or by concert, or in the advancement of a common interest, or as the result and effect of joint concurrent negli-

gence, there is no doubt but that all the tortfeasors are jointly and severally liable for all the damages done the injured party, and that these damages may be recovered in joint or several actions, although the wrongful conduct or negligence of some may have contributed less than that of others to the injury done.

"Torts may also be joint on account of the relations of the parties, such as the joint liability of the husband and wife for the wife's torts, that of the master and servant for the latter's torts, and that of the principal and agent, employer and employe, partner and co-partner, for the acts of the agent, employe and co-partner, when committed within the scope of the agency, employment, or co-partnership.

"The parties in all these cases are joint tortfeasors. The reason for holding them liable for all the damages inflicted by any of them

this, that where two or more owe to another a common duty and by a common neglect of that duty such other person is injured, then there is a joint tort with joint and several liability.⁵ The weight of authority will, we think, support the more general proposition, that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concert action.⁶ In a recent New Jersey case it is said: "If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well settled principles, each, any or all of the tort feasons may be held. But when each of two or more persons owes to another a separate duty which each wrongfully neglects to perform, then although the duties were diverse and disconnected and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint and the tort feasons are subject to joint and several liability."⁷

By the weight of authority, if a person is injured by a collision between the trains or cars of two companies, then, if both com-

is that they are all present, in person or by representation, and join in the wrongful act, or in some way knowingly aid in doing it, thereby consenting to and approving the entire wrong and injury done. The whole injury is committed by each and all of the trespassers, and it is but just and right that each of them should be held responsible for all the damages inflicted; and, the liability, being several and joint, they may be sued separately or jointly. *

* *

"Where the tort-feasons have no unity of interest, common design, or purpose, or concert of action, there is no intent that the combined acts of all shall culminate in the injury resulting therefrom,

and it is just that each should only be held liable so far as his acts contribute to the injury." pp. 438, 439.

5—See *Matthews v. Delaware, etc., R. R. Co.*, 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261; *Elliott v. Field*, 21 Colo. 378, 41 Pac. 504; and cases cited in last note.

6—See cases cited in following notes:

7—*Matthews v. Delaware, etc., R. R. Co.*, 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261. The more restricted view of joint liability is well presented by the Indiana court of appeals in the following case: *Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522.

panies are negligent, both are jointly and severally liable.⁹ So if a person is injured by a defect or obstruction in a public street and such defect or obstruction was negligently caused by some third party, such as a street railroad company, with respect to its track, or a contractor doing work in the street, or by a company maintaining electric wires, or an abutting owner, and the municipality is also negligent in permitting such defect to exist or remain, then the municipality and such third party are jointly liable.¹⁰ But there is a strong dissent from this view.¹¹ A horse was killed in the street by coming in contact with a telephone wire

9—Washington, etc., R. R. Co. v. Hickey, 5 App. D. C. 436; St. Louis, etc., R. R. Co. v. Hopkins, 100 Ill. App. 567; Matthews v. Delaware, etc., R. R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261; Colegrove v. New York, etc., R. R. Co., 20 N. Y. 492, 75 Am. Dec. 418. But see Richmond, & D. R. R. Co. v. Greenwood, 99 Ala. 501, 14 So. 495.

10—Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; Horgan v. Jones, 131 Cal. 521, 63 Pac. 835; Elliott v. Field, 21 Colo. 378, 41 Pac. 504; Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696; Lake Erie, etc., R. R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. 660; Chicago Economic Fuel Co. v. Myers, 168 Ill. 139, 48 N. E. 66; Chicago, etc., R. R. Co. v. Harrington, 192 Ill. 9, 61 N. E. 450; Union St. Ry. Co. v. Stone, 54 Kan. 83, 37 Pac. 1012; Kansas City v. File, 60 Kan. 157, 55 Pac. 877; Cumberland Tel. & Tel. Co. v. Ware, 115 Ky. 581, 74 S. W. 289; Cline v. Crescent City R. R. Co., 41 La. Ann. 1031, 6 So. 851; Cline v. Crescent City R. R. Co., 43 La. Ann. 327, 9 So. 122, 26 Am. St. Rep. 187; Berkley v. Wilson, 87

Md. 219, 39 Atl. 502; Conowingo Bridge Co. v. Hedrick, 95 Md. 669, 53 Atl. 430; Corey v. Havener, 182 Mass. 250, 65 N. E. 69; McBride v. Scott, 125 Mich. 517, 84 N. W. 1079; McClelland v. St. Paul, etc., Ry. Co., 58 Minn. 104, 59 N. W. 978; Ray v. Jones & Adams Co., 92 Minn. 101, 99 N. W. 782; Matthews v. Delaware, etc., R. R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261; United Electric Ry. Co. v. Shelton, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614; Wilder v. Stanley, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479; Dufur v. Boston & M. R. R. Co., 75 Vt. 165, 53 Atl. 1058; Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744.

11—Richmond, etc., R. R. Co. v. Greenwood, 99 Ala. 501, 14 So. 495; Cleveland v. Bangor, 87 Me. 259, 32 Atl. 892; Trowbridge v. Forepaugh, 14 Minn. 133; Dutton v. Lansdowne Bor., 198 Pa. St. 563, 48 Atl. 494, 82 Am. St. Rep. 814, 53 L. R. A. 469; Wiest v. Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666; Goodman v. Coal Tp., 206 Pa. St. 621, 56 Atl. 65; Trowbridge v. Forepaugh, 14 Minn. 133; Howard v. Union Traction Co., 195 Pa. St. 391, 45 Atl. 1076.

which had fallen across a trolley wire, and became charged with a dangerous current. The fall of the wire was due to the negligence of the telephone company and the trolley company was negligent in not providing guards. It was held to be a case of joint liability.¹² Plaintiff's colt got into the defendant's lot through a defective fence which it was the defendant's duty to maintain. A stranger attempted to drive the colt back and negligently caused him to run into a barbed wire fence, whereby he was injured. The negligence of the two was concurrent and they were jointly liable.¹³ Two persons on motor cycles passed the wagon in which the plaintiff was riding, one on each side, whereby his horse was frightened and he was injured. They were held jointly liable. "It makes no difference," says the court, "that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each. If each contributed to the injury, that is enough to bind both."¹⁴ Two buildings owned in severalty by the two defendants fell at the same time, owing to weak walls, and crushed the plaintiff's building. A joint action was sustained.¹⁵ So where two independently set fires which came together and after their union destroyed the plaintiff's property.¹⁶ Where two or more are unlawfully or negligently racing horses on a street and one injures a traveler, they are all jointly and severally liable.¹⁷ Where the dogs of different owners unite in doing damage a joint action will not lie.¹⁸

12—United Electric Ry. Co. v. Shelton, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614. A similar case and same ruling: Cumberland Tel. & Tel. Co. v. Ware, 115 Ky. 581, 74 S. W. 289; City Electric St. Ry. Co. v. Conery, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570.

13—Wilder v. Stanley, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479.

14—Corey v. Havener, 182 Mass. 250, 65 N. E. 69.

15—Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744. Simmons

v. Everson, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676, is a similar case but the decision is put on somewhat different grounds.

16—McClellan v. St. Paul, etc., Ry. Co., 58 Minn. 104, 59 N. W. 978.

17—Holloway v. McIntosh, 7 Kan. App. 34, 51 Pac. 963; Hanrahan v. Cochran, 12 App. Div. 91, 42 N. Y. S. 1031.

18—Nierenberg v. Wood, 59 N. J. L. 112, 35 Atl. 654; Dyer v. Hutchins, 87 Tenn. 198, 10 S. W. 194.

It is laid down as a general proposition by the court of appeals of New York that, where two or more persons by their several acts or omissions maintain a public or common nuisance, they are jointly and severally liable for the damages caused thereby.¹⁹ In the case referred to three persons owned in severalty three brick houses forming a solid block. They were destroyed by fire and the front walls were left in an unsafe condition. The whole front wall afterwards fell into the street and killed the plaintiff's son, who was on the sidewalk at the time, about opposite the line between two of the houses and where no part of the third wall fell upon him. The defendants were held to be jointly liable.²⁰ But where different proprietors, on a stream, each acting independently and for his own purposes, conduct filth or refuse into the stream from their respective estates, they are held not to be jointly liable.²¹ So where several proprietors drain their premises into the same ditch or water way and the combined waters flood or otherwise damage a lower proprietor.²² But it would be otherwise if there was some concert of action, as if they joined in constructing or maintaining the ditch.²³ The same rule applies to the pollution of the atmosphere as to the pollution of a stream. And where different factories or works, owned and carried on by different proprietors, each discharge volumes of smoke and gases into the atmosphere which mingle and spread over the surrounding territory, injuring vegetation and affecting the health and comfort of those who live in the vicinity, each proprietor is liable only for the proportion

19—*Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676. See also *Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522.

20—*Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744 is a similar case.

21—*Chipman v. Palmer*, 77 N. Y. 51; *Gallagher v. Kemmerer*, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909, 54 Am.

St. Rep. 522; *Bowman v. Humphrey*, 124 Ia. 744, 100 N. W. 854. *Contra*, *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21.

22—*Bonte v. Postel*, 109 Ky. 64, 58 S. W. 536, 51 L. R. A. 187; *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; *Chicago, etc., R. R. Co. v. Glenney*, 118 Ill. 487.

23—*Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656.

of the damage caused by him, and not jointly and severally for the entire damage.²⁴ "The wrong done by the defendants," says the court, "is the discharge of foul and offensive fumes and gases from their plants, into the air, corrupting and poisoning the same. This is done by each of them upon its own premises, controlled and operated by it independently of, and without any connection or relation whatever with, the other. It is in every sense and by every definition a separate wrong, and it cannot be made joint because the consequences of it afterwards become blended and united with those wrought by other wrongdoers. A tort which is several when committed cannot be made joint by matters occurring subsequently, over which the tortfeasor has no control. The commingling of the gases does not cause those discharged by the different parties to be more injurious, but each has its own proportionate hurtful consequences, such as would have resulted if there had been no blending. * * * The difficulty of ascertaining the extent of the injury done by each of the several tortfeasors furnishes no argument against the rule as we have stated it. That a plaintiff may be embarrassed in proving the wrong done him by one person is no reason why he should recover his damages from another, who did not cause them, merely because he did the plaintiff a similar injury."²⁵

24—*Swain v. Tennessee Copper Co.*, 111 Tenn. 430, 78 S. W. 93.

25—Ibid., pp. 440-442. In the same case, in speaking of the ascertainment of damages and their apportionment, the court further says: "Nor do we see any great difficulty in ascertaining the proportion which the defendant in cases of this character contributed to the damages done the injured party. Take the cases under consideration for an illustration. Proof of the extent and capacity of the several plants causing the damages complained of, the tonnage of ores treated by each of

them, the time each has been in operation, their comparative proximity or distance from the plaintiff's lands, the usual condition of the air currents in that locality, and many other facts and circumstances, will show with substantial certainty the extent of the injury inflicted by each of the defendants; and in this way justice may be done the injured party. It is said in one case that, in the absence of all proof, it may be presumed that the several tortfeasors contributed equally to the damages inflicted, the effect of which would be to throw upon the de-

The master and servant are in general jointly and severally liable for the tortious act of the servant committed in the course of the master's business.²⁶ In one of the cases cited, where the engineer of one train was injured in a collision with another train, due to the negligence of the latter train, the court, in holding the company and the delinquent engineer jointly liable, says: "The servant is liable because of his own misfeasance or wrongful act, in breach of his duty to so use that which he controlled as not to injure another. The master is liable because he acts by his servant, and is, therefore, bound to see that no one suffers legal injury through the servant's wrongful act done in the master's service within the scope of the agency. Both are liable jointly, because from the relation of master and servant they are united or identified in the same tortious act resulting in the same injury."²⁷

fendant tortfeasor the burden of showing that others contributed to the injury, and the extent of such contribution. And in the case of *Little Schuylkill River, etc., Co. v. Richards*, 67 Pa. St. 142, 98 Am. Dec. 209, it is said that juries will measure the damages done by each with a liberal hand, which is doubtless true; and experience will probably show that plaintiffs will not suffer in prosecuting two actions.

"While we are not called upon to pass upon this question, we think that, where defendants are guilty of wrongs necessitating the action, juries should not be held to great nicety and accuracy of judgment in ascertaining the damages to be assessed against each of the tortfeasors; and this court would be slow to interfere with verdicts supposed to be excessive." pp. 454, 455.

26—*Mayer v. Thompson-Hutch-*

inson Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433; *Green v. Berge*, 105 Cal. 49, 38 Pac. 509; *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128; *Vigeant v. Scully*, 35 Ill. App. 44; *Central of Georgia Ry. Co. v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; *Cincinnati, etc., Ry. Co. v. Cook*, 113 Ky. 161, 67 S. W. 383; *Whittaker v. Collins*, 34 Minn. 299; *Schumfert v. Southern Ry. Co.*, 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802; *Gardner v. Southern Ry. Co.*, 65 S. C. 341, 43 S. E. 816; *McHugh v. Northern Pac. Ry. Co.*, 32 Wash. 30, 72 Pac. 450; *Morrison v. Northern Pac. Ry. Co.*, 34 Wash. 70, 74 Pac. 1064. But see *McIntyre v. Southern Ry. Co.*, 131 Fed. 985, — C. C. A. —; *McNemar v. Cohn*, 115 Ill. App. 31.

27—*Schumpert v. Southern Ry. Co.*, 65 S. C. 332, 338, 43 S. E. 813, 95 Am. St. Rep. 802.

Each partner is the agent of all in the transaction of the partnership business and all are liable for the tort of any one of the firm committed within the scope of such agency.²⁸ But it is held that this rule does not apply to malicious torts.²⁹ Where a railroad is leased, both the lessor and lessee are jointly and severally liable for the negligence of the latter in the operation of the road.³⁰ But where the lease is sanctioned by legislative authority and the lessee is given exclusive possession and control of the road, the lessee is alone liable.³¹ So the landlord and tenant may be jointly liable for a defect in the leased premises.³²

28—*Austin v. Appling*, 88 Ga. 54, 13 S. E. 955; *Miller v. Phoenix Ins. Co.*, 109 Ill. App. 624; *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90; *Taylor v. Thompson*, 62 App. Div. 159, 70 N. Y. S. 997.

29—*Swenson v. Erickson*, 90 Ill. App. 358; *Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551, 96 Am. St. Rep. 886; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089. In *Haney Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073, all the partners were held liable for a slander uttered by one in course of the partnership business, but the contrary is held in *Hendricks v. Middlebrooks Co.*, 118 Ga. 131, 44 S. E. 835.

30—*Central of Georgia Ry. Co. v. Wood*, 129 Ala. 483, 29 So. 775; *Driscoll v. Norwich, etc., R. R. Co.*, 65 Conn. 230, 32 Atl. 354; *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 17 N. E. 37, 8 Am. St. Rep. 337; *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Chicago, etc., R. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290; *Suburban R. R. Co. v. Balkwill*, 195 Ill. 535, 63 N. E. 389; *Chicago, etc., R. R. Co. v. Schmitz*, 211 Ill. 446, 71 N. E. 1050; *Nugent v. Boston, etc., R. R. Co.*, 80 Me. 62, 12 Atl. 797; *Logan v. North Carolina R. R. Co.*, 116 N.

C. 940, 21 S. E. 959; *Tillett v. Norfolk, etc., R. R. Co.*, 118 N. C. 1031, 24 S. E. 111; *Kinney v. North Carolina R. R. Co.*, 122 N. C. 961, 30 S. E. 313; *Harden v. North Carolina R. R. Co.*, 129 N. C. 354, 40 S. E. 184, 85 Am. St. Rep. 747, 55 L. R. A. 784; *Harmon v. Columbia, etc., R. R. Co.*, 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686; *Parr v. Spartenburg, etc., R. R. Co.*, 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826; *Cogswell v. West St., etc., Elec. Ry. Co.*, 5 Wash. 46, 31 Pac. 411; *Ricketts v. Chesapeake, etc., Ry. Co.*, 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901; *Fisher v. West Virginia, etc., Ry. Co.*, 39 W. Va. 366, 19 S. E. 382, 23 L. R. A. 758.

31—*Pinkerton v. Pa. Traction Co.*, 193 Pa. St. 229, 44 Atl. 284; *Virginia Midland Ry. Co. v. Washington*, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344; *Hayes v. Northern Pac. R. R. Co.*, 74 Fed. 279, 20 C. C. A. 52. In *St. Louis, etc., Ry. Co. v. Trigg*, 63 Ark. 536, 40 S. W. 579, a railroad and its receivers were held jointly liable for a nuisance caused by an embankment so negligently constructed as to flood the plaintiff's land.

32—*Joyce v. Martin*, 15 R. I. 558, 10 Atl. 617. But where one

Contribution and Indemnity as Between Wrong-Doers. As *under the rules already laid down the party wronged may, at his election, compel any one of the parties chargeable with the act, or any number less than the whole, to compensate him for the injury, it becomes a consideration of the highest importance to the person or persons thus singled out and compelled to bear the loss, whether the others who were equally liable may be compelled to contribute for his relief. On this subject there is a general rule, and there are also some very important exceptions. The general rule may be found expressed in the maxim that no man can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrong-doing, the law will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it.³³

But there are some exceptions to the general rule which rest upon reasons at least as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrong-doers to the injured party, yet as between themselves some of them may not be wrong-doers at all, and their equity to require the others to respond for all the damages may

has exclusive possession and control of a mine and works it as he pleases, paying a royalty to the owner, the latter is not liable for the negligence of the former in working the mine. *Smith v. Belshaw*, 89 Cal. 427, 26 Pac. 834.

33—*Merryweather v. Nixan*, 8 T. R. 186; *Pearson v. Skelton*, 1 M. & W. 504; *Wooley v. Batte*, 2 C. & P. 417; *Adamson v. Jarvis*, 4 Bing. 66; *Colburn v. Patmore*, 1 C. M. & R. 73; *Mitchell v. Cockburne*, 2 H. Bl. 379; *Cumpston v. Lambert*, 18 Ohio, 81, 51 Am. Dec. 442; *Selz v. Unna*, 1 Biss. 521; *S. C. in Error*, 6 Wal. 327; *Minnis v. Johnson*, 1 Duv. 171; *Armstrong Co. v. Clarion Co.*, 66 Pa. St. 218, 5 Am. Rep. 368; *Philadelphia v. Collins*, 68 Pa.

St. 106; *Coventry v. Barton*, 17 Johns. 142, 8 Am. Dec. 376; *Stone v. Hooker*, 9 Cow. 154; *Miller v. Fenton*, 11 Paige, 18; *Rhea v. White*, 3 Head, 121; *Anderson v. Saylor*, Id. 551; *Percy v. Clary*, 32 Md. 245; *Spalding v. Oakes*, 42 Vt. 343; *Churchill v. Holt*, 131 Mass. 67, 41 Am. Rep. 191; *Bard v. Midvale Steel Works*, 12 Phila. 255; *Johnson v. Torpy*, 35 Neb. 604, 53 N. W. 575, 37 Am. St. Rep. 447; *Torpy v. Johnson*, 43 Neb. 882, 62 N. W. 253; *Boyer v. Bolender*, 129 Pa. St. 324, 18 Atl. 445, 15 Am. St. Rep. 723; *Oakdale v. Gamble*, 201 Pa. St. 289, 50 Atl. 971; *Gulf, etc., Ry. Co. v. Galveston, etc., Ry. Co.*, 83 Tex. 509, 18 S. W. 956.

be complete.³⁴ There are many such cases where the wrongs are unintentional, or where the party, by reason of some relation, is made chargeable with the conduct of others.

A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants.³⁵ Here the injured party may justly hold both the *company and its servants to responsibility; but the [*168] actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it entrusts its business. As between the company and its servants the latter alone is the wrong-doer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself.³⁶

On the other hand, suppose the servant be directed by the officers of the company to do a certain act which it turns out they had no right to do, and for doing which he is made to pay

34—*Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713.

35—Where the owner or occupant of premises creates a nuisance in the sidewalk adjoining the same, without the authority of the municipal authorities, either express or implied, and the city is compelled to pay damages to a person for a personal injury, caused by the same, the author of such a nuisance will be responsible to the city for the damages so paid by it. *Gridley v. City of Bloomington*, 68 Ill. 47. See *Chicago v. Robbins*, 2 Black, 418 and cases p. *626 *post*. Where a lot owner should build a walk and in default of his doing it the duty falls upon a public board, he and it are not joint tort feorsors if from failure to build it, a traveler is injured. *Detroit v. Chaffee*, 70 Mich. 80, 37

N. W. 882. Where damage has been done by failure of defendant to repair a bridge, as was its duty, to one dealing with plaintiff and using the bridge, and plaintiff has paid for the damage, he may have indemnity from party chargeable directly with duty of repairing the bridge. *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121.

36—Where the master has been compelled to pay damages to a third party on account of the servant's negligence, the latter is liable over to the master. *Georgia Southern, etc., Ry. Co. v. Jossey*, 105 Ga. 271, 31 S. E. 179; and see, *Mainwaring v. Brandon*, 8 Taunt. 202; *S. C. 2 Moore*, 125; *Respass v. Morton*, *Hardin*, 234; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647; *Grand Trunk R. R. Co. v. Latham*, 63 Me. 177.

damages. Here, if the act was a plain and manifest wrong, as would be leaving the cars to commit a battery, the servant can have no indemnity, because he must have known the act to be unlawful; but if the act directed was one he had reason to suppose was legal, and he obeyed directions on that supposition, it would ill become the railroad company to demand that he be treated as a wrong-doer when called upon to indemnify him against the consequences of the act its officers had directed. In such a case the servant is not in morals a wrong-doer at all, and his claim to indemnity would be based upon a faithful obedience to orders which he had a right to presume were rightful, nothing to the contrary appearing.³⁷ And where the plaintiff, as agent of the defendant and at her direction, employed an attorney and took proceedings to get possession of certain property and obtained such possession by means of such proceedings, and was afterwards held liable in trespass because the court had no jurisdiction, it was held that he could maintain a suit against the defendant for indemnity.³⁸

A similar case is presented where an officer executes imperfect or defective process under a promise of indemnity, or in [*169] good *faith serves process on the wrong person or property, on a like promise, or at the special request or under the direction of the plaintiff. In general, as already stated, the officer must take upon himself the responsibility for all action which purports to be official,³⁹ and if he serves void process, or renders himself a trespasser in the service of valid process, it does not excuse him that he had for the purpose the participation or the advice of the plaintiff or his attorney; that fact only

37—*Humphries v. Pratt*, 2 D. & Clark, 288; *Morris v. Brokley*, 8 East. 172, note; *Walker v. Hunter*, 2 M. G. & S. 324; *Bond v. Ward*, 7 Mass. 125; *Spangler v. Commonwealth*, 16 S. & R. 68, 16 Am. Dec. 548; *Commonwealth v. Van Dyke*, 57 Pa. St. 34; *Tarr v. Northey*, 17 Me. 113, 35 Am. Dec. 232; *Howard v. Clark*, 43 Mo. 344; *Chamberlain*

v. Beller, 18 N. Y. 115; *Howe v. Buffalo, etc., R. R. Co.*, 37 N. Y. 297; *Nelson v. Cook*, 17 Ill. 446; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Long v. Neville*, 36 Cal. 455, 95 Am. Dec. 199.

38—*Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713.

39—*Nelson v. Cook*, 17 Ill. 443.

makes another party liable with him. Neither will that fact entitle him to indemnity, for the parties are both wrong-doers, and each is a free agent in what is done, not being at all under the control of the other. But if the question of law or of fact is in doubt, it is not incompetent for the officer to allow the party suing out process to take upon himself the responsibility; and when he does so and agrees to indemnify the officer, the agreement may be enforced. This is upon the same ground, that though as to the party injured both may be technically in the wrong, it is not so as between the parties themselves.⁴⁰ Such case may be contrasted with cases in which the thing done was a palpable wrong, such, for instance, as the publication of a libel, in which the most formal agreement to indemnify will be void.⁴¹

*The foregoing are cases of indemnity; that is to say, [*170] cases in which the party actually in the wrong was com-

40—*Nelson v. Cook*, 17 Ill. 443; *Crossman v. Owen*, 62 Me. 528; *Grimes v. Taylor*, 93 Ill. App. 494. As to the right of an officer to demand indemnity, see *Commonwealth v. Van Dyke*, 57 Pa. St. 34; *Chamberlain v. Beller*, 18 N. Y. 115; *Smith v. Cicotte*, 11 Mich. 383; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613. A promise to indemnify against liability for an act not known at the time to be unlawful is valid. *Coventry v. Barton*, 17 Johns. 142, 8 Am. Dec. 376; *Stone v. Hooker*, 9 Cow. 154; *Armstrong Co. v. Clarion Co.*, 66 Pa. 218, 5 Am. Rep. 368; *Avery v. Halsey*, 14 Pick. 174. Where an officer is induced by the false statements of another as to the ownership of certain property, to take it into his possession, and is sued and compelled to pay damages for so doing, he is entitled to indemnity from the party guilty of the fraud and those assisting him therein. *Kenyon v. Woodruff*, 33 Mich. 310.

41—*Shackell v. Rosier*, 2 Bing. (N. C.) 634; *Arnold v. Clifford*, 2 Sumner, 238; *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260. See *Nelson v. Cook*, 17 Ill. 443. "There is no implied obligation to contribute between tort feorsors, and if such liability can be created by express promise the promise must rest upon some other consideration than the fact of the tort and of the relation of the accused parties to each other in the guilty transaction." *Nichols v. Nowling*, 82 Ind. 488. An agreement by a prisoner that if the officer will permit him to go at large he will appear at the time of trial or will pay the creditor's debt, is void, and if the officer renders himself liable by accepting it and permitting the prisoner to go, he can recover no indemnity, his act being unlawful. *Pitcher v. Bailey*, 8 East, 171; *De Mesnil v. Dakin*, L. R. 3 Q. B. 17; *Riley v. Whittaker*, 49 N. H. 145, 6 Am. Rep. 474; *Ayer v. Hutchins*, 4 Mass. 370, 3 Am. Dec. 232; Ap-

pelled to relieve of the whole burden the party only technically in the wrong. But there are cases of contribution which are supported by reasons equally satisfactory. Two persons, we will suppose, are jointly concerned in a transaction, and in carrying it out according to arrangement and without any intent to injure others, they are nevertheless made liable by some invasion of another's right. Here, if one were compelled to make good the loss, we should say his right to contribution was undoubted. As between himself and his associate he was not a wrong-doer at all.⁴²

An attempt has been made in some cases to lay down a general rule by which it may be determined in every case whether the party is or is not entitled to contribution. Thus, in Ohio, the judicial conclusion is, that "the common sense rule and the legal rule are the same, namely, that when parties think they are doing a legal and proper act, contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere."⁴³

[*171] *This statement is a little inaccurate, in that it denies redress in the cases only in which parties are conscious of

pleby *v. Clark*, 10 Mass. 59; *Hopkinson v. Leeds*, 78 Pa. St. 396.

42—*Bailey v. Bussing*, 28 Conn. 455; *Wooley v. Batte*, 2 C. & P. 417; *Pearson v. Skelton*, 1 M. & W. 504; *Horbach's Administrator v. Elder*, 18 Pa. St. 33; *Moore v. Appleton*, 26 Ala. 633. This rule has been applied to one of several officers of a corporation who had been held liable to a creditor of the corporation for the neglect of all to file certain certificates as required by statute. "By accepting their positions as officers," it was said, "they impliedly agreed that they would make and publish the annual certificate, and failing in this, that they would become responsible to the creditors of the corporation. While engaged, therefore, in a lawful business, they

have been guilty of a neglect which has exposed them to this liability." As between themselves, therefore, the rules of contribution that prevail between joint contractors, rather than those between joint tortfeasors, ought to apply. *Nickerson v. Wheeler*, 118 Mass. 295, 298.

43—*Acheson v. Miller*, 2 Ohio St. 203. This was a case of contribution as between sureties, a part of whom had become trespassers in an endeavor to enforce payment of the debt by the principal. The rule as stated in the Ohio case is adopted in *Farwell v. Bicker*, 129 Ill. 261, 21 N. E. 792, 16 Am. St. Rep. 267, 6 L. R. A. 400. Compare *Grund v. Van Vleck*, 69 Ill. 479, where a partner, not present, and not consenting to the suing

wrong-doing. There are many cases in which the absence of consciousness of wrong could not excuse a man either in law or morals. An English case states the rule more concisely as follows: "The rule that the wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."⁴⁴ If he knew the act was illegal, or if the circumstances were such as to render ignorance of the illegality inexcusable, then he will be left by the law where his wrongful action has placed him.⁴⁵

Where two or more attaching creditors, acting in good faith, cause attachments to be levied on the same property at the same time and it turns out that they were in the wrong and one is compelled to pay damages, he may have contribution from the

out of an illegal distress warrant, was held not responsible in trespass, because of that relation. Citing *Petrie v. Lamont*, 1 C. & M. 57. If not responsible to the principal action, he could not, we suppose, be held entitled to contribute on the ground merely of a possible benefit from the proceedings. See, further, *Ives v. Jones*, 3 Ired. L. 538, 40 Am. Dec. 421; *Bryan v. Landon*, 5 Thomp., etc. (N. Y.) 594.

44—*Adamson v. Jarvis*, 4 Bing. 66, 73, per Best, C. J. See *Betts v. Gibbins*, 2 Ad. & El. 57, 74; *Humphreys v. Pratt*, 2 Dow. & Cl. 288; *Avery v. Halsey*, 14 Pick. 174; *Jacobs v. Pollard*, 10 Cush. 287, 289, 57 Am. Dec. 105, per BIGELOW, J.; *Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320; *Johnson v. Torpy*, 35 Neb. 604, 53 N. W. 575, 37 Am. St. Rep. 447; *Torpy v. Johnson*, 43 Neb. 882, 62 N. W. 253.

45—The right of contribution has been applied to the case of

two counties, one of which had been compelled to pay damages to a person who had been injured by the breaking down of a bridge which both were under obligation to maintain. *Armstrong Co. v. Clarion Co.*, 66 Pa. St. 218, 5 Am. Rep. 368. In Vermont it has been held that where one of two joint owners of a vicious animal was compelled to pay damages to a party injured through the animal not being kept under restraint, he could not recover contribution of the other, although the latter was in charge of the animal when the injury occurred. *Spalding v. Oaks*, 42 Vt. 343. If the wrong consist in an assault on the person, and not merely a trespass to property, no contribution can be demanded, however innocent of wrong intent the wrong-doer may be. *Cumpston v. Lambert*, 18 Ohio, 81, 51 Am. Dec. 442. In one case, it is said, that by modern authorities the principle of non-contribution is confined to cases where there has

others.⁴⁶ Where mail contractors negligently obstructed a sidewalk affording access to a station whereby a passenger was injured, who recovered a judgment against the railroad company, they were held liable to indemnify the company.⁴⁷ A railroad company negligently frightened the plaintiff's horse which ran away and injured C. The latter recovered a judgment against the plaintiff for his injuries. In a suit by the plaintiff against the railroad company for indemnity it was held that, though the judgment established that the plaintiff was negligent, yet if his negligence consisted solely in his being where he was at the time, and the railroad company could have prevented the accident by due care, then the plaintiff could recover.⁴⁸

It may be thought that the maxim that the law will not relieve a party from the consequences of his own wrong-doing partakes more of severity to the particular person singled out by the plaintiff for pursuit, than it does of general justice. It may be right to punish him, but is it right to exempt from punishment [*172] others equally guilty? If strict justice, *as between individuals were all that was aimed at, we should be compelled to answer this question in the negative; and we must therefore look further for the reason of the rule.

been moral wrong. It, therefore, includes a case where the wrong was a breach of trust. *Herr v. Barber*, 2 Mackey, 545; so, *Sherner v. Spear*, 92 N. C. 148. But fraudulent grantees of land, where the deeds to them are set aside by a judgment creditor of their grantor may have contribution between themselves in favor of those who pay the creditor. *Janvrin v. Curtis*, 63 N. H. 312; and in case of an unsuccessful attempt at fraud, contribution may be decreed in equity. *Goldsborough v. Darst*, 9 Ill. App. 205.

46—*Vandiver v. Pollak*, 97 Ala. 467, 12 So. 473; *Farwell v. Bicker*, 129 Ill. 261, 21 N. E. 792, 16 Am. St. Rep. 267, 6 L. R. A. 400. And

see *Britt v. Pitts*, 111 Ala. 401, 20 So. 484.

47—*Old Colony R. R. Co. v. Slavons*, 148 Mass. 363, 19 N. E. 372, 12 Am. St. Rep. 558.

48—*Nashua Iron & Steel Co. v. Worcester, etc., R. R. Co.*, 62 N. H. 159. The decision was on demurrer to the narr. The court says: "If, notwithstanding the defendant's negligence, the plaintiffs, by ordinary care, could have prevented the fright of the horse, or its running after the fright, or in the absence of ability to do either, if they could have avoided the running upon and injury to Clapp, their misconduct, and not that of the defendants, was the cause of the accident, and they cannot re-

It has already been intimated that the rule, as we have given it, is one of very general application, and not by any means confined to cases of joint torts. Whoever, by his pleadings in any court of justice, avows that he has been engaged with others in an unlawful action, or has concerted with them an unlawful enterprise, and that in arranging for or carrying it out he has been unfairly treated by his associates, or has suffered an injustice which they should redress, will be met by the refusal of the court to look any further than his complaint, which it will at once order dismissed. The following reasons may be assigned for this action: 1. The discouragement of all illegal transactions by distinctly apprising every person who engages in them that the risk he incurs is not merely of being compelled to share with the others the loss that may follow, for this, in many cases would be insignificant, and in all cases would be small in proportion to the size and formidable character of the combination. He is, therefore, given to understand that whoever takes part in an illegal transaction must do so under a responsibility only measured by the whole extent of the injury or loss; an understanding very well calculated to make men to hesitate who, under a different rule, would be disposed to give full scope to evil inclinations. But 2. The State, from a consideration of its own pecuniary interests, and of the interests of other litigants, may wisely refuse to assist in adjusting equities between persons who have been engaged in unlawful action. The expense of administering justice is always a large item in the State's expenditures, and one which must be borne by the common contributions of the people. Where one has suffered from participation in an unlawful undertaking, what justice can there be in any demand on his part that the State shall supply courts and officers and incur expense to indemnify him against a loss he has encountered through a dis-

cover. On the other hand, if the plaintiff's carelessness consisted solely in permitting the horse to be where it was at the time, and ordinary care by the defendants would have prevented its fright, or if the plaintiffs, by proof of any

state of facts competent to be shown under the declaration, can make it appear that at the time of the occurrence they could not, and the defendants could, by such care have prevented the accident, they are entitled to recover." p. 166.

regard of its laws? Here the question is not merely one of what is right, as between himself and his associates, but what is best for the interest of the State. When that question is up for consideration, the fact is not to be overlooked that there are unavoidable difficulties and necessary evils connected with [*173] litigation which multiply rapidly as the cases *increase in number. Courts and juries, at the best, are but imperfect instruments for the accomplishment of justice; and the greater the volume of litigation, the less is the attention which any particular case is likely to receive, and the greater the probability that right may be overcome by artifice, or by a false and deceptive exposition of the facts. Trusty justice must follow after wrong with deliberate and measured tread; and every honest litigant in seeking it must be more or less impeded, when those who have no just claim on the consideration of the court are allowed to push their complaints before it. It is not necessary to look further for reasons in support of the rule to which attention has been directed.

The application of this rule to the cases of partnerships and corporations is somewhat peculiar. A corporation is an artificial person, and the artificial personality is to be considered in its legal transactions instead of the personality of its members. A partnership is also, for all the legitimate purposes of its business, a legal entity, though it is taken notice of and reached by legal process, only through the personality of its members. There may be wrongs by corporations, and wrongs by partnerships; and where these consist in a mere breach of conventional duty, it has been seen already that those only are to be pursued upon whom the duty rests, which, in these cases, would be the partnership or corporation; and when the association is made responsible, the members necessarily share the loss in proportion to their respective interests. On the other hand, if an individual is made responsible for a tort committed in the service of any joint association, his right to indemnity must be governed by the rules which prevail in the relation of master and servant, and which need not be repeated here.⁴⁹

49—If one in the employ of a corporation commits a distinct trespass, which he must have known to be such, it is immaterial who en-

***Injury Sustained in Wrong-doing.** A further illus- [*174]
tration of the rule which refuses redress to one participat-
ing in a wrong may be had where two persons are engaged in the
same unlawful enterprise or action, and in prosecuting it one is
injured by the negligence of the other.⁵⁰ The case of a riot may
be instanced, in which several persons are engaged destroying
property or inflicting personal injuries on third parties, and in
the course of it one unintentionally inflicts injury upon one of
his associates. The case stated is perceived to be one where the
injured party, but for the element of wrong which it involves on
his part, would unquestionably have been entitled to redress.
Had he, for example, been a mere passer-by,⁵¹ or had a like injury
occurred to him through the negligence of another, while engaged
in play, or under any circumstances which charged him with no
illegality and no negligence, the rule of law would have been
clear, and his right to redress unquestionable. Another case like
that of the riot, in principle, would be that of two smugglers,
one of whom owns the vessel by which the illegal venture is
made, and the other undertakes to manage it, but carelessly
strands it while running illegally into port. Still another may
be suggested, of parties engaging in sports on Sunday, when they
are illegal, in the course of which one is injured, for want of due

couraged, directed or commanded
it; and if his *own* negligence has
brought injury upon another, he
alone is liable, and cannot insist
on being indemnified. *Poulton v.*
London & S. W. R. R. Co., L. R. 2
Q. B. 535; *Evansville & C. R. R.*
Co. v. Baum, 26 Ind. 70; *Ill. Cen-*
tral R. R. Co. v. Downey, 18 Ill.
259; *Vanderbilt v. The R. T. Co.*,
2 N. Y. 479; *Foster v. Essex Bank*,
17 Mass. 478, 9 Am. Dec. 168;
Rounds v. D. L. & W. R. R. Co.,
3 Hun, 329; *Kirby v. Penn. R. R.*
Co., 76 Pa. St. 506, 509; *Waller v.*
Martin, 17 B. Mon. 181; *Little*
Miami R. R. Co. v. Wetmore, 19
Ohio St. 110, 2 Am. Rep. 373. A

partner may maintain an action
against another for the destruc-
tion of his individual property
used in the firm business. *Newby*
v. Harrell, 99 N. C. 149, 5 S. E.
284. Missouri has a statute on
the subject of contribution be-
tween wrong-doers. *Paddock-Haw-*
ley Iron Co. v. Rice, 179 Mo. 480,
78 S. W. 634.

50—See *Wallace v. Cannon*, 38
Ga. 199. Also *Peacock v. Terry*, 9
Ga. 137, where one sought to re-
cover for fraud in a transaction
in which he was a participant in
the fraudulent purpose.

51—*James v. Campbell*, 5 C. & P.
372.

care on the part of the other. In all the cases supposed, the party injured must undertake to trace his injury to the negligence of the other; but in doing so, he will show that at the time he was engaged in unlawful action, and that it was only because of such action that the opportunity was afforded for the negligent injury. The injury, therefore, is as directly traceable to his own breach of the law as to the negligence of his associate; each has combined to produce it, and without both it could not have occurred. What the plaintiff must ask, therefore, must be this: That the law shall relieve him from the consequences of his disregard of the law; and this, as already stated, it will refuse to do.⁵² His demand is based upon his own violation of duty to the political society.

[*175] *The cases which most often occur in which this principle is involved are those in which the negligent party is wholly blameless, except for his negligence, and only the injured party has been guilty of intentional breach of the law. Many of these cases arise under the laws forbidding the transaction of ordinary business on Sunday, and also forbidding travel on that day, except for purposes of necessity or charity. Under these statutes one who engages in business, or travels on that day, is presumptively engaged in an illegal transaction, and if he claims compensation for an injury resulting from it, he must rebut the presumption by showing that what he did was necessary or had a benevolent purpose.⁵³ This rule has been applied in the case of suits against a town or city for injury received on Sunday, in consequence of defects in the highway which the

52—It might also be said that where one engages with others in a breach of the law, he is chargeable with want of due care, so that his injury at the hands of one of his associates is to be attributed to the concurring negligence of both. Or it may be said that usually it is only reckless parties who plan and engage in unlawful action, and therefore the want of care and prudence on the part of the associates ought to be assumed as one of the probable concomitants, the risks of which each must be understood to take upon himself when he engages in the unlawful act.

53—*Bosworth v. Swansey*, 10 Met. 363, 365, 43 Am. Dec. 441; *Stanton v. Metropolitan R. R. Co.*, 14 Allen, 485; *Hinckley v. Penobscot*, 42 Me. 89.

corporation was bound, by statute, to keep in repair. In such a case, unless the plaintiff shows a justifiable cause for being abroad on the street, he cannot recover.⁵⁴ If he can show that he was on his way to attend religious services, he makes out a sufficient cause; and, in this country, where religious opinion is free and entire religious equality is the rule of the law, no inquiry concerning the character of the services can be raised beyond this: Was the party on his way to the meeting for the honest purpose of divine worship and religious instruction? If so, the errors and absurdities of his belief, and the nature of the services, provided the laws of morality and public decency are not violated, are matters which concern only himself.⁵⁵ So, if he can show *that he was only passing from one part of his [*176] premises to another for the necessary care of his stock, or looking after his stray cattle, or going to witness his neighbor's will, or to have his own will executed,⁵⁶ or to visit the sick or the poor, or to do any other act which it is morally fit and proper should be done on that day,⁵⁷ he thereby relieves his conduct

54—*Bosworth v. Swansey*, 10 Met. 363, 43 Am. Dec. 441; *Jones v. Andover*, 10 Allen, 18; *Johnson v. Irasburg*, 47 Vt. 28, 19 Am. Rep. 111; *Holcomb v. Danby*, 51 Vt. 428; *Connolly v. Boston*, 117 Mass. 64, 19 Am. Rep. 396; *Hinckley v. Penobscot*, 52 Me. 89; *Tillock v. Webb*, 56 Me. 100; *Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56.

55—In *Feital v. Middlesex R. R. Co.*, 109 Mass. 398, 12 Am. Rep. 720, a woman was injured through the negligence of a railroad company on her way home from a spiritualist meeting. As a part of the exercises at the meeting was an exhibition of "spiritual manifestations;" but these she did not attend, and she gave evidence that she believed in spiritualism, and attended the meeting as a matter of conscience and for worship. COLT, J.: "The necessity of travel-

ing, within the exception in the Lord's Day Act, is to a great extent determined by its moral fitness and propriety, and it would have been erroneous to have ruled, as matter of law, that traveling for such a purpose was not within the exception. *Bennett v. Brooks*, 9 Allen, 118; *Commonwealth v. Sampson*, 97 Mass. 407; *Hamilton v. Boston*, 14 Allen, 475. It was for the jury to say, upon all the evidence, whether the meeting was of the character claimed by the plaintiff, and whether she attended it for the honest purpose of divine worship and religious instruction."

56—We should think this a reasonable deduction from *Bennett v. Brooks*, 9 Allen, 118, in which the execution of a will on Sunday was held proper and lawful.

57—*Commonwealth v. Knox*, 6

from the imputation of illegality by thus making it appear either that, in the legal sense of the term, he was not traveling at all, or that his travel was for a charitable purpose, or was justified by the necessity of the case.⁵⁸ And the authorities fully warrant us in saying that the words charity and necessity, in the statutes, are not to receive any narrow or technical construction, but a sensible one that will embrace all cases not fairly within the mischief intended to be prevented. As has been said in Illinois, the moral fitness and propriety of what was done are not to be judged of in the abstract, but are to be determined under the circumstances of each particular case.⁵⁹ In Massachusetts, it has been decided that one who, on Sunday, travels several miles to visit a stranger and is injured by the negligence of the railway company, cannot recover for [*177] the injury unless some special occasion of necessity *or charity can be shown for the visit.⁶⁰ In contrast with this is the case in Vermont where the plaintiff was *in- [*178] jured when traveling eight miles to visit his young children, who were living with an aunt, and in which he was held to be justified on the ground of necessity. The necessity in-

Mass. 76; *Johnson v. People*, 31 Ill. 469. See *Logan v. Mathews*, 6 Pa. St. 417.

58—See the Massachusetts statutes reviewed in *Hamilton v. Boston*, 14 Allen, 475. In that case it was held that a person walking a short distance with a friend for exercise on Sunday was not violating the statute against traveling on that day, and might recover for an injury suffered by reason of a defect in the street. To same effect, *Davidson v. Portland*, 69 Me. 116, 31 Am. Dec. 253, and see *Barber v. Worcester*, 139 Mass. 74.

59—*Johnson v. People*, 31 Ill. 469.

60—*Stanton v. Metropolitan R. R. Co.*, 14 Allen, 485. The suit was against a street railway com-

pany for an injury attributed to their negligence while plaintiff was being carried on one of their cars. GRAY, J.: "It is not and could not be denied that the plaintiff was 'traveling,' within the meaning of these statutes, at the time of suffering the injury complained of. He was proceeding in a street car drawn by horses from Charlestown, entirely across the city of Boston, in which he resided, to Roxbury, on the opposite side.

"It is equally clear that he was not traveling from necessity or charity. He had left Boston on the morning of the same day, and spent the greater part of the day in Charlestown, for the purpose of collecting a debt. A negotiation

tended by the statute, it was said, was a moral and not a physical necessity. An act which, under the circumstances, is fit and proper to be done, is not prohibited. The plaintiff could not fully discharge his obligations to his children without being where they

between a creditor and his debtor, or any other act done for the purposes of private gain, under no apparent or extraordinary emergency, is neither necessary nor charitable in any sense. *Ex parte Preston*, 2 Ves. & B. 312; *Phillips v. Innes*, 4 Cl. & Fin. 234; *Bennett v. Brooks*, 9 Allen, 120; *Jones v. Andover*, 10 Allen, 18. His subsequent visit to a friend of his companion, who does not appear to have been any relation or friend of his own, was equally unnecessary upon the most liberal construction of the statute. *Pearce v. Atwood*, 13 Mass. 351; *Flagg v. Millbury*, 4 Cush. 244; *Logan v. Mathews*, 6 Pa. St. 417.

"Being engaged in a violation of law, without which he would not have received the injury sued for, the plaintiff cannot obtain redress in a court of justice. *Way v. Foster*, 1 Allen, 408; *Hamilton v. Boston*, 14 Allen, 475. The opposite view, approved by the Supreme Court of Pennsylvania in *Mohney v. Cook*, 26 Pa. St. 342, 67 Am. Dec. 419, and by Mr. Justice GRIER, in *Philadelphia, etc., R. R. v. Philadelphia, etc., Towboat Co.*, 23 How. 218, is inconsistent with the established law of the Commonwealth.

"The defendants may have been justified in running their cars for the purpose of transporting passengers to and from public worship, or for other necessary or charitable objects. But the fact that the defendants were acting

lawfully would not protect the plaintiff in unlawful traveling, or increase his right to maintain an action against them. *Commonwealth v. Knox*, 6 Mass. 78; *Myers v. State*, 1 Conn. 502; *Scully v. Commonwealth*, 35 Pa. St. 511." See, further, *Smith v. Boston & Maine R. R. Co.*, 120 Mass. 490, 21 Am. Rep. 538. Traveling on the cars on Sunday bars passenger's recovery. *Bucher v. Fitchburg R. R.*, 131 Mass. 156. So driving to make a call after attending a funeral. *Davis v. Somerville*, 123 Mass. 594, 35 Am. Rep. 399. See *Lyon v. Desotelle*, 124 Mass. 387. So if a railroad employee is injured in the service. *Day v. Highland St. Ry.* 135 Mass. 113, 46 Am. Rep. 447; *Reed v. Boston, etc., Co.*, 140 Mass. 199. If one sailing for pleasure is run down by negligence of officers of a steamer, he cannot recover; otherwise, if the collision was a wanton act. *Wallace v. Merrimack, etc., Co.*, 134 Mass. 95, 45 Am. Rep. 301. But one may recover if injured by a defect in street while walking home Sunday evening from making a social call. *Barker v. Worcester*, 139 Mass. 74. So if a dog runs out and frightens a horse unlawfully driven. *White v. Lang*, 128 Mass. 598, 35 Am. Rep. 402. The Massachusetts doctrine is followed in the Federal Courts where the injury occurs in that State. *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 8 S. C. Rep. 974.

were. Under these circumstances it was morally proper for him to travel to them, and no other facts or circumstances were necessary to show the fitness of his traveling. His duties to his children arose out of his relations to them; the propriety of the journey out of its necessity to the discharge of his duties.⁶¹ So where the plaintiff took a female guest to her home on Sunday night, she stating that she had to return that night.⁶² Recent cases in Maine and Massachusetts, where the doctrine originated and where it has found its chief support, have greatly modified the doctrine and in both states the doctrine has now been abolished by statute.⁶³ Thus it has been held in those states, before the enactment of the statutes referred to that driving on Sunday for the enjoyment of the open air and the benefit of the health, was not a violation of the Sunday law, such as would prevent a recovery.⁶⁴ The Supreme Court of Maine says: "The primary object of such legislation has been to secure to private citizens the quiet enjoyment of Sunday as a day of rest, and to encourage the observance of moral duties on that day, but not to authorize any arbitrary or vexatious interference with the private habits and comfort of individuals. * * And it has been repeatedly held in this State and Massachusetts that walking or riding in the open air in a quiet and civil manner with no object of business or pleasure except the enjoyment of the air and gentle exercise and the consequent promotion of health, is not in violation of the Sunday law."⁶⁵

Other cases in which relief to one injured while violating the

61—WHEELER, J., in *McClary v. Lowell*, 44 Vt. 116, 118, 8 Am. Rep. 366. On the general subject see, also, *Commonwealth v. Sampson*, 97 Mass. 407; *Commonwealth v. Josselyn*, *Ib.* 411; *Connolly v. Boston*, 117 Mass. 64, 19 Am. Rep. 396; *Gorman v. Lowell*, *Ib.* 65. For a son to hire a horse to visit his father on Sunday is not illegal. *Logan v. Mathews*, 6 Pa. St. 417.

62—*Buck v. Biddeford*, 82 Me. 433, 19 Atl. 912.

63—*Bridges v. Bridges*, 93 Me. 557, 45 Atl. 827; Acts, 1895, Me., C. 129; *Jordan v. New York*, etc., R. Co., 165 Mass. 346, 43 N. E. 111, 52 Am. St. Rep. 522, 32 L. R. A. 101; Stats., 1884, Mass. C. 37.

64—*Cleveland v. Bangor*, 87 Me. 259, 32 Atl. 892; *Sullivan v. Me. Cent. R. R. Co.*, 82 Me. 196, 19 Atl. 169, 8 L. R. A. 427; *Hamilton v. Boston*, 14 Allen, 475.

65—*Cleveland v. Bangor*, 87 Me. 259, 266, 267, 32 Atl. 892.

Sunday laws has been denied are the following: A party aiding the owner to clear out his wheel pit and injured while doing so by the negligence of the owner;⁶⁶ one defrauded in an exchange of horses on that day;⁶⁷ one who lets to another a horse to be ridden or driven on Sunday, and finds it injured by negligent or immoderate driving,⁶⁸ but this doctrine has been often questioned, and at last has been overruled in the State where it originated.⁶⁹ One who walks on the grass in a public park, in violation of a park regulation, cannot recover for falling into a trench.^{69a} Nor can a person recover for negligence in sending a telegram which relates to gambling in stocks.^{69b}

The cases arising under the Sunday laws must be considered in connection with a familiar principle in the law of civil wrongs, which, as applied by other courts, would leave them without support. The principle is, that to deprive a party of redress because of his own illegal conduct, the illegality must have contributed *to the injury.⁷⁰ Applying this to the case of [*179] injuries received from defects in the highway while traveling on Sunday, the following has been said of it: "To make good the defense (of illegality) it must appear that a relation existed between the act or violation of law, on the part of the plaintiff, and the injury or accident of which he complains and the relation must have been such as to have caused or helped

66—*McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119.

67—*Robeson v. French*, 12 Met. 24, 45 Am. Dec. 236. In *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368, it was decided that an action will not lie for the conversion of a chattel delivered on Sunday in exchange for another, and retained by the defendant notwithstanding the return of the other by the plaintiff. Compare *Tucker v. Mowrey*, 12 Mich. 368.

68—*Gregg v. Wyman*, 4 Cush. 322. See *Parker v. Latner*, 60 Me. 528, 11 Am. Rep. 210; *Wheldon v. Chappel*, 8 R. I. 230, 233. *Contra*,

Newbury v. Luke, 68 N. J. L. 189, 52 Atl. 625.

69—See *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310; *Morton v. Gloster*, 46 Me. 520; *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Harrison v. Marshall*, 4 E. D. Smith 271.

69a—*Sheehan v. Boston*, 171 Mass. 296, 50 N. E. 543.

69b—*Morris v. Western Union Tel. Co.*, 94 Me. 423, 47 Atl. 926.

70—Approved in *Gross v. Miller*, 93 Ia. 72, 61 N. W. 385, 26 L. R. A. 605.

to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another. It must have been some act, omission or fault naturally and ordinarily calculated to produce the injury, or from which the injury or accident might naturally and reasonably have been anticipated under the circumstances. It is obvious that a violation of the Sunday law is not of itself an act, omission or fault of this kind, with reference to a defect in the highway or in a bridge over which a traveler may be passing, unlawfully though it may be. The fact that the traveler may be violating this law of the State, has no natural or necessary tendency to cause the injury which may happen to him from the defect. All other conditions and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day, and the time of the accident or injury, as that it was on Sunday, is wholly immaterial so far as the cause of it or the question of contributory negligence is concerned. In this respect it would be wholly immaterial, also, that the traveler was within the exceptions of the statute, and traveling on an errand of necessity or charity, and so was lawfully upon the highway.''⁷¹

71—*Sutton v. Wauwatosa*, 29 Wis. 21, 28, 9 Am. Rep. 534. In this case the Massachusetts cases are examined, and their soundness denied in an able opinion by Dixon, Ch. J. The principle he relies upon was fully recognized in Massachusetts, in a case in which one sued for an injury to his vehicle which, at the time, was standing in a public street in a manner prohibited by city ordinance, and where notwithstanding he was held entitled to recover. *Steele v. Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191. Citing *Jones v. Andover*, 10 Allen, 20, and distin-

guishing *Gregg v. Wyman*, 4 Cush. 322, and *Way v. Foster*, 1 Allen, 408, "where the plaintiff was obliged to lay the foundation of his action in his own violation of law." In *Holt v. Green*, 73 Pa. St. 198, 200, 13 Am. Rep. 737, *MERCUR, J.*, says: "The test whether a demand connected with an illegal transaction is capable of being enforced by law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. *Swan v. Scott*, 11 S. & R. 164; *Thomas v. Brady*, 10 Pa. St. 170; *Scott v. Duffy*, 14 Pa. St. 20. If a plaintiff cannot open his case

*And in New York, where the carriers of passengers [*180] have a right to transport persons on Sunday for some purposes, it has been decided that all who are carried by them are entitled to protection against their negligence, and may recover for a negligent injury, irrespective of the purpose for which they were traveling.⁷² And we should say that the weight of authority at this time was in favor of the doctrine so clearly stated by the *Wisconsin court, and [*181] which had previously been announced by the courts of

without showing that he has broken the law, a court will not assist him. *Thomas v. Brady*, supra. It has been well said that the objection may often sound very ill in the mouth of a defendant, but it is not for his sake the objection is allowed; it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is, that no court will lend its aid to a party who grounds his action upon an immoral or upon an illegal act. *Mitchell v. Smith*, 1 Binn. 118, 2 Am. Dec. 417; *Seidenbender v. Charles' Admrs.*, 4 S. & R. 159, 8 Am. Dec. 682. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation. *Coppell v. Hall*, 7 Wall. 558."

In *Mohney v. Cook*, 26 Pa. St. 342, 67 Am. Dec. 419, the fact that the plaintiff was navigating a stream in violation of the Sunday laws was held no bar to a recovery against one who, by erecting an obstruction in the stream, caused an injury to the boat. But the law in that case provided a specific remedy for its violation,

which, in the opinion of the court, precluded any other. And denying to him redress for an injury would, in effect, be imposing a further penalty.

72—*Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126, 17 Am. Rep. 231, citing and relying upon *Philadelphia, etc., R. R. Co. v. Towboat Co.*, 23 How. 209. The case seems to be grounded in part on the fact that the contract to carry was legal on the part of the railroad company, and the obligation to carry with care was incident to it. One may recover for carrier's negligence, though he is on a Sunday excursion. *Opsahl v. Judd*, 30 Minn. 126. See *Knowlton v. Milwaukee, etc., Co.*, 59 Wis. 278. In an action against a carrier for failure to deliver cattle, it was claimed that the delay was justifiable, as to have delivered sooner would have necessitated Sunday transportation. It was held that such transportation was a work of necessity, and even if not, that the carrier could not rely in defense on the shipper's infraction of law in shipping stock at a time which necessitated Sunday transportation. *Phila., etc., R. R. Co. v. Lehman*, 56 Md. 209. *Merritt v. Earl*, 29 N. Y. 115, 86 Am. Dec.

Pennsylvania and New Hampshire, and by the Federal Supreme Court.⁷³ So the plaintiff may now recover for injuries re-

292, decides that the fact that a contract for the carriage of property was made on Sunday will not preclude a recovery for a loss thereof. A bailment on Sunday does not change the title, and the bailor may recover as for a conversion, if the bailee fails in performance and converts the property to his own use. *Dwight v. Brewster*, 1 Pick. 50, 11 Am. Dec. 133. See *Lewis v. Littlefield*, 15 Me. 233; *Logan v. Mathews*, 6 Pa. St. 417; *Stewart v. Davis*, 31 Ark. 518, 25 Am. Rep. 576; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253.

73—*Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Corley v. Bath*, Id. 530; *Dutton v. Weare*, 17 N. H. 34, 43 Am. Dec. 590; *Mohney v. Cook*, 26 Pa. St. 342, 67 Am. Dec. 419; *Philadelphia, etc., R. R. Co. v. Towboat Co.*, 23 How. 209; *Black v. Lewiston*, 2 Idaho, 276, 13 Pac. 80; *Taylor v. Western Union Tel. Co.*, 95 Ia. 740, 64 N. W. 660; *Kansas City v. Orr*, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; *Delaware, etc., R. R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435 (Ct. of E. & A.). See *Hamilton v. Goding*, 55 Me. 419; *Whelden v. Chappel*, 8 R. I. 230; *Armstrong v. Toler*, 11 Wheat. 258. The following cases have more or less bearing in the same direction: *Alger v. Lowell*, 3 Allen, 402; *Bigelow v. Reed*, 51 Me. 325; *Davis v. Mann*, 10 M. & W. 548. That the illegality of such traveling does not prevent re-

covery, see, further, *Sewell v. Webster*, 59 N. H. 586; *Platz v. Cohoes*, 89 N. Y. 219; *Knowlton v. Milwaukee, etc., Co.*, 59 Wis. 278. "A defendant who is sued in tort cannot justify the tort whether wilful or negligent by proving that the plaintiff when injured was transgressing the law, so long as the tort and transgression are independent or disconnected except in time and place in their relation to each other." *DURFEE, C. J. Baldwin v. Barney*, 12 R. I. 392, 34 Am. Rep. 670.

In a case in Maine it appeared that plaintiff took a walk for recreation on Sunday, stopped for a glass of beer, and afterward fell on a sidewalk where was a ridge of ice. The city was held liable for his injury. The court say: "Walking on the Sabbath for exercise is not against the statute. Stepping aside for a glass of beer may have been a violation of law. If it was, and it had nothing to do with causing the accident, it offered no excuse for a defective highway. To exonerate the city from liability, it must appear that plaintiff's violation of law contributed to the accident." *Davidson v. Portland*, 69 Me. 116, 31 Am. Dec. 253. In the case of *Baker v. Portland*, 58 Me. 199, 4 Am. Rep. 274, *BARROWS, J.*, considers the subject with great care, and reaches the same conclusion with the court in Wisconsin. The action was one brought against the city for an injury occasioned by a defective way. The plaintiff at the time was driving more than six miles an hour, in violation of a city ordinance. The

ceived while unlawfully at work on Sunday.⁷⁴ The question is much considered by the Supreme Court of Iowa in *Gross v. Miller*, where the defendant negligently shot the plaintiff while they were hunting together on Sunday in violation of the Sunday law. The doctrine of the Massachusetts cases was repudiated and the defendant held liable. The court says: "Men go hunting every day, and no one reasonably anticipates that, as a result, one will negligently shoot the other. As we have already indicated, the result was not to be expected from the act of going hunting on the Sabbath day. It was a result which, under other like circumstances, would be as likely to happen on any other day. We are unable to discover, on principle, any sound reason for holding that plaintiff should be deprived of the usual remedy given him by law for the injury sustained by the negligent act of another, because he and the other person were both violating the law, when it is clear that the violation of the law has no causative connection with the injury complained of, and plaintiff in no way contributed to the injury of which he complains."⁷⁵

The fact that a party injured was at that time violating the law, does not put him out of protection of the law;⁷⁶ he is never put by the law at the mercy of others. If he is negligently injured in the highway, he may have redress, notwithstanding

Judge told the jury that this was no defense, provided the fast driving did not in any degree contribute to produce the injuries complained of. *Held*, correct. But if one uses the highway for an illegal horse race, he is entitled to no redress for an injury received in consequence of the way being out of repair. *McCarthy v. Portland*, 67 Me. 167, 24 Am. Rep. 23.

It does not defeat recovery that one was driving unlawfully if a dog runs out and frightens his horse to his damage. *Schmid v. Humphrey*, 43 Ia. 652, 30 Am. Rep.

414; *White v. Lang*, 128 Mass. 598, 35 Am. Rep. 402.

74—*Louisville, etc., Ry. Co. v. Buck*, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520; *Taylor v. Star Coal Co.*, 110 Ia. 40, 81 N. W. 249; *Illinois Cent. R. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. 665; *Eagan v. Maguire*, 21 R. I. 189, 42 Atl. 506; *Hoadley v. International Paper Co.*, 72 Vt. 79, 47 Atl. 69.

75—*Gross v. Miller*, 93 Ia. 72, 82, 61 N. W. 385, 26 L. R. A. 605.

76—*Chesapeake, etc., Ry. Co. v. Jennings*, 98 Va. 70, 77, 34 S. E. 986.

at the time he was on the wrong side of the way, provided this fact did not contribute to the injury.⁷⁷ So where one is injured by reason of a defect in a highway, it is no defense that he was at the time driving at an unlawful speed, provided the latter fact did not contribute to the injury.⁷⁸ *So a [*182] party who engages in an unlawful game may recover for an injury suffered while playing it,⁷⁹ and so may one who participates in a race and is willfully run down by his competitor.⁸⁰ Where the violation of law is merely a condition

77—*Baker v. Portland*, 58 Me. 199, 4 Am. Rep. 274; *Daniels v. Clegg*, 28 Mich. 32; *Beckerle v. Weiman*, 12 Mo. App. 354. See *Stewart v. Machias Port*, 48 Me. 477; *Morton v. Gloster*, 46 Me. 520. If travelers meet at the intersection of city streets the statute as to turning to the right does not apply. Each must use reasonable care. *Morse v. Sweeney*, 15 Ill. App. 486. The fact that a vessel run into and injured by another was at the time disregarding the law in any particular, only bears on the question of negligence, and is not conclusive against a recovery of damages for the injury suffered from the collision. *Blanchard v. Steamboat Co.*, 59 N. Y. 292; *Hoffman v. Union Ferry Co.*, 68 N. Y. 385; and see cases, *post*, *799, *800.

78—*Cullman v. McMin*n, 109 Ala. 614, 10 So. 981; *Broschart v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; *Chesapeake, etc., Ry. Co. v. Jennings*, 98 Va. 70, 34 S. E. 986. In the Connecticut case, the court referring to the Sunday travel cases says: "There must of course be a fallacy somewhere in the reasoning that can reach opposite results while proceeding

upon the same premises. It seems to me that the fallacy in the reasoning of those who support the Massachusetts rule consist in assuming (unconsciously no doubt) that a mere concurrence of the illegal act with the accident in point of time is to be treated as a concurring cause of the injury, which it is not, but rather a condition or incident merely." p. 14.

79—*Etchberry v. Leville*, 2 Hilton, 40.

80—MERRICK, J.: "It appears from the bill of exceptions to have been fully proved upon the trial that the defendant wilfully ran down the plaintiff and broke his sleigh, as is alleged in the declaration. No justification or legal excuse of this act was asserted or attempted to be shown by the defendant; but he was permitted, against the plaintiff's objection, to introduce evidence tending to prove that it was done while the parties were trotting horses in competition with each other for a purse of money, the ownership of which was to be determined by the issue of the race. And it was ruled by the presiding judge, that if this fact was established, no action could be maintained by the

and not a contributory cause of the injury a recovery may be

plaintiff to recover compensation for the damages he had sustained, even though the injury complained of was willfully inflicted. Under such instructions the jury returned a verdict for the defendant.

"We presume it may be assumed as an undisputed principle of law that no action will lie to recover a demand, or a supposed claim for damages, if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing, and depending in any degree upon, an illegal agreement, to which he himself has been a party. *Gregg v. Wyman*, 4 Cush. 322; *Woodman v. Hubbard*, 5 Foster, 67, 57 Am. Dec. 310; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253; *Simpson v. Bloss*, 7 Taunt. 246. But this principle will not sustain the ruling of the court, which went far beyond it and laid down a much broader and more comprehensive doctrine. Taken without qualification, and just as they were given to the jury, the instructions import that, if two persons are engaged in the same unlawful enterprise, each of them, during the continuance of such engagement, is irresponsible for wilful injuries done to the property of the other. No such proposition as this can be true. He who violates the law must suffer its penalties, but yet in all other respects he is under its protection and entitled to the benefits of its remedies.

"But in this case the plaintiff had no occasion to show, in order to maintain his action, that he

was engaged, at the time his property was injured, in any unlawful pursuit, or that he had previously made any illegal contract. It is true that, when he suffered the injury, he was acting in violation of the law; for all horse trotting upon wagers for money is expressly declared by statute to be a misdemeanor punishable by fine and imprisonment. St. 1846, c. 200. But neither the contract nor the race had, so far as appears from the facts reported in the bill of exceptions, or from the intimations of the court in its ruling, anything to do with the trespass committed upon the property of the plaintiff. That he had no occasion to show into what stipulations the parties had entered, or what were the rules or regulations by which they were governed in the race, or whether they were in fact engaged in any such business at all, is apparent from the course of the proceedings at the trial. The plaintiff introduced evidence tending to prove the wrongful acts complained of in the writ, and the damage done to his property, and there rested his case. If nothing more had been shown, he would clearly have been entitled to recover. He had not attempted to derive assistance either from an illegal contract or an illegal transaction. It was the defendant, and not the plaintiff, who had occasion to invoke assistance from proof of the illegal agreement and conduct in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit.

had.⁸¹ The fact that game is unlawfully exposed for sale and is subject to forfeiture by proper proceedings under the law, is no defense to an action of trover against one who has wrongfully seized it.⁸² So an inn-keeper cannot excuse himself for the loss of his guest's property on the ground that it was intended for sale without a license in violation of law.⁸³ And where a sheriff wrongfully levied on the plaintiff's liquor and fixtures in his bar room, it was held to be no defense to an action of trespass that the business was carried on without a license, although this fact would preclude a recovery of special damages for injury to the business.⁸⁴ The employment of the property by the plaintiff in carrying on an unlawful business does not operate to defeat a right of recovery based on the right of property legally acquired, and of which he cannot be deprived except by due process of law. Such right of property will be protected against an unauthorized and wrongful seizure, notwithstanding plaintiff may, at the time, be using it in carrying on an illegal business.

[*183] *By the decisions it is settled that if two persons voluntarily engage in a fight, which implies a license by each that the other may strike him, this license being illegal and void, either party injured by the other may have his action for the

The plaintiff sought nothing of this kind, and the mutual misconduct of the parties in one particular cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another." *Welch v. Wesson*, 6 Gray, 505.

81—*Newcomb v. Boston Protective Dept.*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; *Delaware, etc., R. R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435.

82—*Averill v. Chadwick*, 153 Mass. 171, 26 N. E. 441.

83—*Cohen v. Marmel*, 91 Me. 274, 39 Atl. 1030, 64 Am. St. Rep. 225, 40 L. R. A. 491.

84—*Smith v. nkelspiel*, 91 Ala. 528, 8 So. 490. In regard to the claim for special damages for injury to the business the court says: "In the contemplation of the law, an unlawful business has no value. In such case, the claim to such damages rests upon violations of the law, and plaintiff's right to recover them cannot be established without the aid of the illegal business. Parties engaged in a business offensive to and prohibited by the law, must be re-

battery.⁸⁵ Further illustrations of the general principle may be found in those cases in which it has been decided that even a trespasser may demand redress when the injury he receives can not be justified as a necessary and moderate employment of force in defense of one's person or possessions.⁸⁶

garded as having forfeited its protection, so far as respects such business." p. 532.

85—*Boulter v. Clark*, Bull. N. P. 16; *Mathew v. Ollerton Comb*, 218; *Logan v. Austin*, 1 Stew. 476; *Hannan v. Edes*, 15 Mass. 346; *Brown v. Gordon*, 1 Gray, 182; *Stout v. Wren*, 1 Hawks, 420, 9 Am. Dec. 653; *Bell v. Hansley*, 3 Jones (N. C.), 131; *Dole v. Erskine*, 35 N. H. 503; *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230; *Bartlett v. Churchill*, 24 Vt. 218; *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538; *Jones v. Gale*, 22 Mo. App. 637. See *State v. Newland*, 27 Kan. 764. The statutory pen-

alty for refusing to send a message by telegraph is incurred, though the message was intended to accomplish an immoral purpose. *Western U. Tel. Co. v. Ferguson*, 57 Ind. 495.

86—*Bird v. Holbrook*, 4 Bing. 628; *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306; *Sherfry v. Bartley*, 4 Sneed, 58, 67 Am. Dec. 597; *Curtis v. Carson*, 2 N. H. 539; *Ogden v. Claycomb*, 52 Ill. 365; *Trodden v. Henn.*, 85 Ill. 237; *Steinmetz v. Kelly*, 72 Ind. 442. A trespasser may recover for an injury by a vicious bull kept on the land trespassed upon. *Marble v. Ross*, 124 Mass. 44.

WRONGS AFFECTING PERSONAL SECURITY.

In this chapter will be considered those wrongs which affect the bodily organization of individuals, or which deprive them of their rightful liberty of movement. These are wrongs which have no necessary relation to an ownership of property, though in some cases the extent of the injury may be affected by such ownership, and in others rights in property may be so involved that the same acts may be innocent or injurious, when they would take the opposite character, were no such rights in question. In the course of what is said, it will appear that, as regards the person itself—the bodily existence—the purpose of the law is to establish such rules as shall constitute a complete protection against any violence whatsoever, whether perceptible injury results from it or not. Such rules are as practicable here as they are impracticable in some cases of rights of a more indefinite and intangible character; such, for example, as the right to protection in reputation.

ASSAULTS AND BATTERIES.

Assaults. An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.¹ Such would be the raising of the hand in anger, with

1—*Brezinski v. Tierney*, 60 43 Mich. 521. The assault need
Conn. 55, 22 *Atl.* 486; *Hickey v.* not be committed in anger. *John-*
Welch, 91 *Mo. App.* 4; *Liebstadter* *son v. McConnel*, 15 *Hun*, 293. It
v. Fedugreen, 80 *Hun*, 245, 29 *N.* has been held that the violence
Y. S. 1039; *State v. Baker*, 20 *R. I.* need not be used toward the per-
275, 38 *Atl.* 653, 78 *Am. St. Rep.* son of the man assaulted. Strik-
863. There must be proof of vio- ing and kicking his horse, at-
lence actually offered so near that tached to a wagon, in which he
harm might ensue if the party was is, may be an assault on him.
not prevented. *People v. Lilley*, *Clark v. Downing*, 55 *Vt.* 259, 45

an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol *at one who is within its range;² the pointing of [*185] a pistol not loaded at one who is not aware of that fact,

Am. Rep. 612. Where the defendant entered the plaintiff's kitchen, where she was at work and was violent and abusive in regard to some garbage that had been dumped in his yard, and shook his fist in her face and threatened her with bodily harm, whereby the plaintiff was greatly frightened and suffered a miscarriage in consequence, it was held an assault and that defendant was liable for all the consequences. *Plouty v. Murphy*, 82 Minn. 268, 84 N. W. 1005. Compare *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657. The mere use of profane and abusive language towards one is not an assault. *State v. Daniel*, 136 N. C. 571, 48 S. E. 544.

2—*Hickey v. Welch*, 91 Mo. App. 4; *State v. Baker*, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863; *State v. Taylor*, 20 Kan. 643. Not if he is not within range. *Tarver v. State*, 43 Ala. 354. Shooting a gun loaded only with powder at twenty steps distance is an assault. *Crumbley v. State*, 61 Ga. 582. But to put one's hand upon his sword, and say: "If it were not assize time I would not take such language from you," is no assault. *Redman v. Edolfe*, 1 Mod. 3. Neither is it, if one presents a pistol, accompanied by words which negative an intent to employ it. *Blake v. Barnard*, 9 C. & P. 626. Words alone never constitute an assault. *State v. Mooney*, Phil. (N. C.) 434; *Smith v. State*, 39 Miss. 521; *Warren v. State*, 33

Tex. 517; *Reid v. State*, 71 Ga. 865; *Norris v. Casel*, 90 Ind. 143; *Scott v. Fleming*, 16 Ill. App. 539, but the provocation may be shown in mitigation of punitive damages. *Corcoran v. Harran*, 55 Wis. 120. See *People v. Lilley*, 43 Mich. 521. Threatening if attacked to cut down one with an axe, held in striking attitude, does not constitute an assault if no actual attempt is made to use the axe. *Cutler v. State*, 59 Ind. 300. See *Reid v. State*, 71 Ga. 865; *Bishop v. Ranney*, 59 Vt. 316. But where one drew a pistol, and pointing it at a man who attempted to stop his team, exclaimed, "I will shoot any man who attempts to stop my mules," held, to be an assault. CHALMERS, J.: "A man has the legal right to protect his property against trespass, opposing force to force. If, therefore, the offer had simply been to commit a common assault, as by declaring that he would strike with his hand, or with some implement or weapon not dangerous, Hairston would have been guilty of no offense. If a man takes my hat, or offers to do so, against my will, and I, drawing back my hand, declare that I will strike if he does not forbear, I only meet the trespass by an offer to use such force as may be appropriate and necessary. But I cannot at once leap to an assault with deadly weapons and a threat to kill. If I were to kill under such circumstances, the killing would be murder; and hence

and making an apparent attempt to shoot;³ shaking a [*186] whip *or the fist in a man's face in anger;⁴ riding or running after him in threatening and hostile manner with a club or other weapon;⁵ and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile as-

I have made an assault which, if carried into a battery, with fatal results, would constitute the gravest crime. As no trespass upon property will primarily justify the taking of life, so an offer to commit a trespass cannot justify an assault with a deadly weapon, accompanied by threat to kill unless the party desists. The means adopted are disproportionate to, and not sanctioned by, the end sought. We think, therefore, that Hairston might well have been convicted of an assault. *Morgan's Case*, 3 Ired. 186; *Myerfield's Case*, Phil. (N. C.) 108; *Smith v. State*, 39 Miss. 521." *Hairston v. State*, 54 Miss. 689, 693, 28 Am. Rep. 392.

3—*Beach v. Hancock*, 27 N. H. 223; *Regina v. St. George*, 9 C. & P. 483; *Richels v. State*, 1 Sneed, 606. See *Rapp v. Commonwealth*, 14 B. Mon. 614; *State v. Cherry*, 11 Ired. 475. Threatening to shoot, with pistol in hand, is an assault, though it be neither cocked nor loaded. *State v. Church*, 53 N. C. 15. *Contra*, *State v. Sears*, 86 Mo. 169; see *McKay v. State*, 44 Tex. 43. Compare *Regina v. James*, 1 C. & K. 530. Presenting an unloaded gun at one who supposes it to be loaded within shooting distance is not such an assault as can be punished criminally, although it may sustain a civil action. *Chapman v. State*, 78 Ala. 436, 56

Am. Rep. 42, citing many cases. Holding an uncocked gun without threatening words or gestures, near one, while a third person threatens him is not an assault. *Flournoy v. State*, 7 S. W. Rep. 865 (Tex.).

4—See *People v. Yslas*, 27 Cal. 630; *State v. Rawles*, 65 N. C. 334, 6 Am. Rep. 744. In this last case it is held that where several persons, with implements that may be used for offensive purposes, including a gun, follow another, though at a considerable distance, and, by threatening and insulting language, put him in fear, and drive him out of his way, it is an assault. See *State v. Martin*, 85 N. C. 508; *State v. Horne*, 92 N. C. 805.

5—*Mortin v. Shoppe*, 3 C. & P. 373. Making apparently an attempt to ride over one is an assault. *State v. Sims*, 3 Strob. 137. It is an assault upon a woman to chase after her, calling upon her to stop, with an apparent purpose to commit a rape upon her, though she is not overtaken. *State v. Neeley*, 74 N. C. 425, 21 Am. Rep. 496. So to put one's arm around her neck. *Goodrum v. State*, 60 Ga. 509. So to sit upon the bed of a woman and lean over her bed making indecent proposals. *Newell v. Witcher*, 53 Vt. 584, 38 Am. Rep. 703.

saults that threaten danger to his person; "a right to live in society without being put in fear of personal harm."⁶

Batteries. A successful assault becomes a battery. A battery consists in an injury actually done to the person of another in an angry or revengeful, or rude or insolent manner, as by spitting in his face, or in any way touching him in anger, or violently jostling him out of the way,⁷ or in doing any intentional violence to the person of another.⁸ The wrong here consists, not in the touching, so much as in the manner or spirit in which it is done, and the question of bodily pain and injury is important only as affecting the damages. Thus, to lay hands on another in a hostile manner is a battery, though no damage follows; but to touch another, merely to attract his attention, is no battery, and not unlawful.⁹ And to push gently *against one, in the endeavor to make way through a [*187] crowd, is no battery; but to do so rudely and insolently is, and may justify damages proportioned to the rudeness.¹⁰ Where defendant was licensed to enter the plaintiff's outer door for the purpose of delivering milk and, in disregard of a com-

6—GILCHRIST, J., in *Beach v. Hancock*, 27 N. H. 223, 229. The judge truly says: "Without such security society loses most of its value. Peace and order and domestic happiness inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security."

7—1 Hawk. P. C. 263; *Coward v. Baddeley*, 4 H. & N. 478; *Bigelow, Lead. Cas. on Torts*, 231. Every battery includes an assault. *Fitzgerald v. Fitzgerald*, 51 Vt. 420.

8—*Birmingham Ry. & Elec. Co. v. Ward*, 124 Ala. 409, 27 So. 471; *Reeden v. Evans*, 52 Ill. App. 209; *White v. Kellogg*, 119 Ind. 320, 21 N. E. 901; *McMurrin v. Rigby*, 80 Ia. 322, 45 N. W. 877; *Watson v. Rinderknecht*, 82 Minn. 235, 84 N.

W. 798; *Emmons v. Quade*, 176 Mo. 22, 75 S. W. 103; *Collins v. Butler*, 179 N. Y. 156, 71 N. E. 746; *Isaacs v. Flahire*, 14 Misc. 249, 35 N. Y. S. 716; *Goldsmith v. Joy*, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500; *Ward v. White*, 86 Va. 212, 9 S. E. 1021, 19 Am. St. Rep. 883; *Beck v. Thompson*, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870; *Bosburg v. Putney*, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226; *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445; *Nipp v. Wisheart*, 7 Ind. App. 642, 34 N. E. 1006; *O'Hara v. State*, 21 Ind. App. 320, 52 N. E. 414.

9—*Coward v. Baddeley*, 4 H. & N. 478.

10—*Cole v. Turner*, 7 Mod. 149; *Bigelow, Lead. Cas. on Torts*, 231.

mand not to enter his sleeping room, did so and took hold of the plaintiff to wake him up in order to present a bill, it was held to be an assault and battery.¹¹ So where the defendant recklessly rode a bicycle against the plaintiff who was standing on the sidewalk.^{11a}

Batteries Assented To. It is implied, in an assault or battery, that it is committed against the assent of the person assaulted; but there are some things a man can never assent to, and therefore his license in such cases can constitute no excuse. He can never consent, for instance, to the taking of his own life. His life is not his to take or give away; it would be criminal in him to take it, and equally criminal in any one else who should deprive him of it by his consent. The person who, in a duel, kills another, is not suffered to plead the previous arrangements and the voluntary exposure to death by agreement, as any excuse whatever. The life of an individual is guarded in the interest of the State, and not in the interest of the individual alone; and not his life only is protected, but his person as well. Consent cannot justify an assault.

But suppose, in the duel one is not killed, but only wounded; may he have an action against his adversary for this injury? If there is any reason why he may not, it must be because he has consented to what has been done. *Volenti non fit injuria*. But if he had no right or power to consent, and the consent expressed in words was wholly illegal and void, the question then is, how a consent which the law forbids can be accepted in law as a legal protection?

Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. He is not injured by a negligence which is partly chargeable to his own fault. A man may not even complain of the adultery of his wife, which he connived

11—*Richmond v. Fisk*, 160 Mass. 450, 20 N. E. 132, 10 Am. St. Rep. 34, 35 N. E. 103. 76, 3 L. R. A. 221.

11a—*Mercer v. Corbin*, 117 Ind.

at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone.

But in case of a breach of the peace it is different. The State is wronged by this, and forbids it on public grounds. If men fight, the State will punish them. If one is injured, the law will *not listen to an excuse based on a breach of the [*188] law. There are three parties here, one being the State, which, for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable, that consent to an assault is no justification.¹² "Where a combat involves a breach of the peace, the mutual consent of the parties thereto is to be regarded as unlawful, and as not depriving the injured party, or, for that matter, each injured party, from recovering damages for injuries received from the unlawful acts of the other."¹³ The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order; such as slight batteries in play or lawful games,¹⁴ such unim-

12—Buller, N. P., 16; Stephens, N. P., 211; Mather v. Ollerton, Comb. 218; Hannen v. Edes, 15 Mass. 346; Stout v. Wren, 1 Hawks. 420, 9 Am. Dec. 653; Bell v. Hansley, 3 Jones (N. C.) 131; Logan v. Austin, 1 Stew. 476; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 231; Shay v. Thompson, 59 Wis. 540, 48 Am. Rep. 538; Lund v. Tyler, 115 Ia. 236, 88 N. W. 333; Grotton v. Glidden, 84 Me. 589, 24 Atl. 1008; Barholt v. Wright, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535; Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Jones v. Gale, 22 Mo. App. 637; Commonwealth v. Collberg, 119 Mass. 530, 20 Am. Rep. 328. This case comments upon and dissents from State v. Beck, 1 Hill (S. C.) 363,

and Champer v. State, 14 Ohio St. 437, in which it was held that a fight by agreement was not an assault. But in Barholt v. Wright, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535, this last case is explained as depending on a statute and it is held that consent does not bar the action but goes in mitigation. See State v. Newland, 27 Kan. 764; Smith v. Simon, 69 Mich. 481, 37 N. W. 548. A servant armed in defense of his master's right was shot by an attacking party. Held, that the maxim *volenti non fit injuria* did not apply. Denver, etc., Co. v. Harris, 122 U. S. 597.

13—Lund v. Tyler, 115 Ia. 236, 237, 88 N. W. 333.

14—If one is injured in mutual play, it is no battery, unless there

portant injuries, as even when they constitute technical wrongs, may well be overlooked and excused by the party injured, if not done of deliberate malice. But an injury, even in sport, would be an assault, if it went beyond what was admissible in sports of the sort, and was intentional.¹⁵

Deception may sometimes be equivalent to force as an ingredient in an assault. Thus it has been said in Massachusetts: "If one should hand an explosive substance to another and induce him to take it by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery, and that would necessarily include an assault; although he might not be guilty even of an assault if the substance failed to explode, or failed to cause any injury. It would *be [*189] the same if it exploded in his mouth or stomach. If that

which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured externally or internally, by mechanical or chemical force."¹⁷ This was said in a case in which a party was prosecuted as for a criminal assault and battery for delivering to another something to be eaten, in which a deleterious drug was concealed, intending that the latter should eat it and be affected by it, as actually took place. The deceit by means of which the person was induced to take the drug was, it was said, a fraud upon the will, equivalent to force in overpowering it.¹⁸

was an intention to injure. *Fitzgerald v. Cavin*, 110 Mass. 153; *Gibelene v. Smith*, 106 Mo. App. 545, 80 S. W. 961. As to liability for death from boxing in sport with soft gloves, see *Reg. v. Young*, 10 Cox Cr. C. 371.

15—See *Christopherson v. Bare*, 11 Q. B. 473, 477; *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81.

17—WELLS, J., in *Commonwealth v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350.

18—Citing *Commonwealth v. Burke*, 105 Mass. 376, 7 Am. Rep. 531; *Commonwealth v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350; *Regina v. Loch*, 12 Cox C. C. 244; *Regina v. Sinclair*, 13 Id. 28; *Regina v. Button*, 8 C. & P. 660, and disapproving *Regina v. Hanson*, 2 C. & K. 912. Where defendants induce, by an offer of money, an habitual drunkard to drink three pints of liquor at a sitting and so produce death, his administra-

Intent. In batteries there must always be an intent, express or implied to do the injury; and therefore an accidental hurt, in which the actor was blameless, is no battery. But it is not essential that the precise injury which was done should have been designed. One who hurls a missile into a crowd may have no one in view as the object of injury, but he commits a battery upon the person struck.¹⁹ So where the defendant, in driving boys away from his premises, threw a stick at two boys and unintentionally hit a third.²⁰ While the plaintiff was talking to another person who had hold of his arm, the defendant, a mutual friend, came along and, in fun, gave the other person a violent jerk, which threw the plaintiff down and injured him. The defendant was held liable, though no harm was intended.²¹ So if two persons fight, and unintentionally one strikes a third, this is a battery of the latter, and is not excused as mere accident, for the purpose was to strike an unlawful blow to the injury of some one.²² Where one, threatened with an immediate attack upon his premises in the night, mistook a friend for an enemy and hit him with a club, it was held there was no liability if there was no negligence in making the mistake.²³

Battery in Self-Protection. In any case of forcible assaults on the person, as in other cases of actions seemingly unlawful there may sometimes be lawful justification. Thus, the right of one person to complete immunity may be waived by such un-

tors may recover for the death. *McCue v. Klein*, 60 Tex. 168, 48 Am. Rep. 260. If one has a right to enter into the possession of lands, deception to obtain a peaceful entry does not make it wrongful. *Stearns v. Sampson*, 59 Me. 568.

19—*Scott v. Shepherd*, 2 W. Bl. 892. One who in sport and not meaning to do harm, but intentionally threw a piece of mortar at another and injured a third person is liable for a battery. *Peterson*

v. Haffner, 59 Ind. 130, 26 Am. Rep. 81.

20—*Talmage v. Smith*, 101 Mich. 370, 59 N. W. 656, 45 Am. St. Rep. 414.

21—*Reynolds v. Pierson*, 29 Ind. App. 273, 64 N. E. 484. See also *Judd v. Ballard*, 66 Vt. 668, 30 Atl. 96; *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226.

22—*James v. Campbell*, 5 C. & P. 372.

23—*Crabtree v. Dawson*, 26 Ky. L. R. 1046, 83 S. W. 557; *Cour-*

lawful action on his part as renders necessary, or at least excusable, the employment of force to resist him. An *in-[*190] stance is where one attempts a battery of another, in which case the latter is not obliged to submit until an officer can be found or a suit commenced; but he may oppose violence to violence, and the limit to his privilege to do so is only this: that he must not employ a degree of force not called for in self-defense; he must not inflict serious injuries unnecessarily in repelling slight injuries; nor take life unless life or limb is in danger, nor even then if, by retreating, he can safely avoid such extremity.²⁴ When he exceeds the limits of necessary pro-

voisier v. Raymond, 23 Colo. 113, 47 Pac. 284.

24—That one may repel force by force see *Miller v. State*, 74 Ind. 1; *Keep v. Quallman*, 68 Wis. 451, 32 N. W. 233; *Drew v. Comstock*, 57 Mich. 176; *Foss v. Smith*, 76 Vt. 113, 56 Atl. 1135. As one is under no obligation to use care to avoid an assault by retreating, contributory negligence is no defense to an action for assault and battery. *Steinmetz v. Kelly*, 72 Ind. 442; *Norris v. Casel*, 90 Ind. 153. Excessive force in resenting opprobrious words justifies counter assault in self-defense. *Tucker v. Walters*, 78 Ga. 232, 2 S. E. 689. But in Vermont it is held that one has no right to use force in self-defense, if he has other means of avoiding an assault which at the time seem to him sufficient. *Howland v. Day*, 56 Vt. 318. As to the obligation of one violently assaulted to retreat, see *Haynes v. State*, 17 Ga. 465; *Tweedy v. State*, 5 Iowa, 433; *State v. Dixon*, 75 N. C. 275; *People v. Harper*, Edm. Sel. Cas. 180.

As to the limit of violence in self-defense, see the following cases: *State v. Kennedy*, 20 Iowa,

569; *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70; *Erwin v. State*, 29 Ohio St. 186, 23 Am. Rep. 733; *Murray v. Commonwealth*, 79 Pa. St. 311; *Roach v. People*, 77 Ill. 25; *Holloway v. Commonwealth*, 11 Bush, 344; *Lewis v. State*, 51 Ala. 1; *Eiland v. State*, 52 Ala. 322; *Irwin v. State*, 43 Tex. 236; *McPherson v. State*, 29 Ark. 225; *Miller v. State*, 74 Ind. 1.

If persons are acting in concert in attacking a man, his right of defending himself applies as to each one in the party if the circumstances were such as to cause a reasonable belief that each one is a party to the attack. *Jones v. State*, 20 Tex. App. 665. If one brings on a fight, he can not defend an action on the ground of self-defense, though in great danger during the affray. *Jones v. Gale*, 22 Mo. App. 637; *People v. Miller*, 49 Mich. 23; *State v. Newland*, 27 Kan. 764; *Thomason v. Gray*, 82 Ala. 291; *McNay v. Stratton*, 9 Ill. App. 215; *Pape v. State*, 69 Ala. 229; *Johnson v. State*, 69 Ala. 253; *Bankston v. Folks*, 38 La. Ann. 267. But if the defendant has only used provoking words and has not actually first assaulted

tection, and employs excessive force, he becomes a trespasser himself, and his assailant may recover damages from him for repelling the assault with a violence not called for.²⁵ In such a case each *party may have an action against the [*191] other: the one for the original assault, and the other for the assault which commences with the employment of excessive force.²⁶ But in New York it has been held that the latter alone can have a remedy in such a case; a conclusion that seems to attach more importance to the apparent anomaly of giving to each party a remedy on the same state of facts than to substantial justice or to the principles which underlie legal remedies.²⁷

plaintiff, the rule is different, since the provocation does not justify an assault upon him. *Norris v. Casel*, 90 Ind. 143; *Cross v. State*, 63 Ala. 40. Where one has brought on a fight he may not use a deadly weapon until he has made an effort in good faith to withdraw. *Presser v. State*, 77 Ind. 274.

25—*Cockcroft v. Smith*, Salk. 642; *State v. Wood*, 1 Bay, 351; *Elliott v. Brown*, 2 Wend. 497, 20 Am. Dec. 644; *Curtis v. Carson*, 2 N. H. 539; *Dole v. Erskine*, 35 N. H. 503; *Philbrick v. Foster*, 4 Ind. 442; *Steinmetz v. Kelly*, 72 Ind. 442; *Trogden v. Henn.*, 85 Ill. 237; *Bartlett v. Churchill*, 24 Vt. 218; *Brown v. Gordon*, 1 Gray, 182. See *Ogden v. Claycomb*, 52 Ill. 365; *Riddle v. State*, 49 Ala. 389. An unlawful arrest may be resisted like any other unlawful assault. *Williams v. State*, 44 Ala. 41, and authorities cited; *People v. McLean*, 68 Mich. 480, 36 N. W. 231.

26—*Dole v. Erskine*, 35 N. H. 503, 510. And, see, *Gizler v. Witzel*, 82 Ill. 322; *Ogden v. Claycomb*, 52 Ill. 365.

27—*Elliott v. Brown*, 2 Wend. 497, 20 Am. Dec. 644. In *Dole v. Erskine*, 35 N. H. 503, 510, *EAST-*

MAN, J., questions the doctrine of this case in the following language: "Up to the time that the excess is used, the party assaulted is in the right. Until he exceeds the bounds of self-defense he has committed no breach of the peace, and has done no act for which he is liable; while his assailant, up to that time, is in the wrong, and is liable for his illegal acts. Now, can this cause of action which the assailed party has for the injury inflicted upon him, and which may have been severe, be lost by acts of violence subsequently committed by himself? Can the assault and battery, which the assailant himself has committed, be merged in or set off against the excessive force used by the assailed party? Unless this be so, and the party first commencing the assault and inflicting the blows, and thus giving to the other side a cause of action, can have the wrong thus done and the cause of action thus given wiped out by the excessive castigation he receives from the other party, then each party may maintain a separate action: the one that is assailed for the assault and battery first committed upon

“That in course of the same fracas, one party at one time and his opponent at another may be guilty of assault, so that each may be entitled to recover damages, seems to be entirely settled by the authorities. The original aggressor continues such so long as the other restrains himself within the bounds of defense, but, when the latter exceeds those bounds by using more than neces-

him, and the assailant for the excess of force used upon him beyond what was necessary for self-defense.

“We think that these are not matters of set-off; that the one cannot be merged into the other, and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed: the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force. And, upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time that had elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defense. When he uses the excessive force, he then, for the first time, becomes a trespasser. And wherein consists the difference, except it be that of time, between a trespass committed by him then and one committed by him on the person the day after?

“In *Elliott v. Brown*, it is conceded that both parties may be in-

dicted and both be criminally punished, notwithstanding it was there held that a civil action can be maintained only against him who has been guilty of the excess. If this be so, and each party can be criminally punished, then each must have been guilty of an assault and battery upon the other; and if thus guilty, why should not a civil action be maintained by each? It would seem that the fact that both are indictable shows that each is in the wrong as to the other, and that each has a cause of action against the other, and that such cause of action may be successfully prosecuted, unless one is to be set off against the other. That torts are not the subjects of set-off is entirely clear.

“We arrive, then, at the conclusion that the causes of action existing in such cases cannot be set off, the one against the other, nor merged, the one into the other, but that each party may maintain an action for the injury received; the assailed party for the assault first committed upon him, and the assailant for the excess above what was necessary for self defense.

“This rule, it appears to us, will do more justice to the parties, and more credit to the law, than the other, for by it the party who commenced the assault, and who has been the moving cause of the difficulty, is made to answer in

sary force, he thereupon becomes the aggressor, and liable for such damages as he thereby inflicts.'²⁸

Where the defendant was being given a "charivari" in the night and his assailants made use of firearms, it was held to amount to a riotous attack upon the plaintiff's house and that he might be justified in shooting in self-defense.^{28a} The question of self-defense would be one of fact for the jury to be determined from a consideration of all the circumstances.^{28b}

In the matter of justifying an assault in self-defense, the conduct of the defendant is to be judged by the appearances at the time as they were calculated to affect the mind of a reasonable man, and not by the actual facts or the defendant's belief.²⁹

*There can be no higher justification for the employment of force than that which a woman may make in defense of her chastity; and, if necessary, it may extend to the taking of life. But the necessity should be apparent on the facts as they then presented themselves to her mind.³⁰ And what the woman may do for herself she may doubtless call in the aid of others to assist her in.

As words never constitute an assault, neither will they justify the employment of force in protection against them, however gross or abusive they may be.³¹ There are probably exceptions

money, instead of having his assault merged in the one which he has provoked, and which has been inflicted upon him by his antagonist."

28—*Gutzman v. Clancy*, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744, citing *Dole v. Erskine*, 35 N. H. 503; *Darling v. Williams*, 35 Ohio St. 58; *Barbalt v. Wright*, 45 Ohio St. 177, 181, 12 N. E. 185; *Shay v. Thompson*, 59 Wis. 540, 13 N. W. 473; *Cooley*, 2nd ed. 190.

28a—*Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138.

28b—Ibid; *Courovisier v. Ray-*

mond, 23 Colo. 113, 47 Pac. 284.

29—*Germolus v. Sausser*, 83 Minn. 141, 85 N. W. 946; *Jemison v. Moseley*, 69 Miss. 478, 10 So. 582; *Courvoisier v. Raymond*, 23 Colo. 113, 47 Pac. 284.

30—See Hawk. P. C. ch. 28 § 22. *People v. Angeles*, 61 Cal. 188. See, also, *Staten v. State*, 30 Miss. 619; *Briggs v. State*, 29 Ga. 723.

31—*Richardson v. Zuntz*, 26 La. Ann. 313; *State v. Martin*, 30 Wis. 216; *Sorgenfrei v. Schrader*, 75 Ill. 397; *Murray v. Boyne*, 42 Mo. 472; *Rarden v. Maddox*, 141 Ala. 506; *Tatnall v. Courtney*, 6 Houst. 434; *Berkner v. Dannenberg*, 116 Ga.

to this general statement in the case of words grossly insulting to females; at least one would be excused where grossly vulgar and insulting language was employed in the presence of his family, if he were promptly to put a stop to it by force. But evidence of an insult by the plaintiff to the defendant's wife three hours before the assault was held not admissible even in mitigation of damages.³² According to some authorities insulting words or abusive language may be shown in mitigation of damages both actual and punitive,³³ and according to others only in mitigation of the latter.³⁴

[*193] ***Defense of Family.** Such force as one may employ in his own defense he may also employ in defense of his wife, his child, or any member of his family.³⁵ But to revenge the wrongs of himself or of his family is no part of his legal

954, 43 S. E. 463, 60 L. R. A. 559; *Irbeck v. Bierl*, 101 Ia. 240, 67 N. W. 400, 70 N. W. 206; *Lund v. Tyler*, 115 Ia. 236, 88 N. W. 333; *Munday v. Landry*, 51 La. Ann. 303, 25 So. 66; *Goucher v. Jamison*, 124 Mich. 21, 82 N. W. 663; *Haman v. Omaha Horse Ry. Co.*, 35 Neb. 74, 52 N. W. 830; *Palmer v. Winston-Salem Ry. & Elec. Co.*, 131 N. C. 250, 42 S. E. 604; *Mahoning Valley Ry. Co. v. De Pascale*, 70 Ohio St. 179, 71 N. E. 633; *Goldsmith v. Joy*, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500. See *Norris v. Casel*, 90 Ind. 143; *Cross v. State*, 63 Ala. 40. Nor will a disregard of one's religious scruples. That a priest is about to administer a sacrament to a person in an almshouse does not justify him in forcibly expelling from the room a person lawfully there. *Cooper v. McKenna*, 124 Mass. 284, 26 Am. Rep. 667.

32—*Dupee v. Lentine*, 147 Mass. 580, 18 N. E. 465. "Provocation cannot be shown, unless it is so

recent and immediate as to form part of the transaction. In other words, to be admissible, it must be provocation happening at the time of the assault." p. 580.

33—*Berkner v. Dannenberg*, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559; *Casper v. Prosdame*, 46 La. Ann. 36, 14 So. 317; *Palmer v. Winston-Salem Ry. & Elec. Co.*, 131 N. C. 250, 42 S. E. 604; *Hayes v. Sease*, 51 S. C. 534, 29 S. E. 259; *Ward v. White*, 86 Va. 212, 9 S. E. 104, 19 Am. St. Rep. 883.

34—*Mitchell v. Gambill*, 140 Ala. 316, 37 So. 290; *Mahoning Valley Ry. Co. v. De Pascale*, 70 Ohio St. 179, 71 N. E. 633; *Goldsmith v. Joy*, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500.

35—*Patton v. People*, 18 Mich. 314, 100 Am. Dec. 173; *Commonwealth v. Malone*, 114 Mass. 295; *Stoneman v. Commonwealth*, 25 Grat. 887; *Staten v. The State*, 30 Miss. 619; *State v. Johnson*, 75 N. C. 174; *Tickell v. Read*, Lofft. 215.

right, and when the danger is repelled, justification for the further use of violence is at an end.³⁶

Defense of Possessions. One may also justify an assault or battery committed in defending his possession of property, either personal or real, subject to the same restriction that he must not employ excessive force.³⁷ "One may resist another in

36—*Cockcroft v. Smith*, 11 Mod. 43; *State v. Gibson*, 10 Ired. 214; *Barfoot v. Reynolds*, 2 Stra. 953; *Regina v. Driscoll*, 1 C. & M. 214.

37—*Abt v. Burgheim*, 80 Ill. 92; *Ayres v. Birtch*, 35 Mich. 501; *Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826; *Fossbinder v. Svitak*, 16 Neb. 499; *Green v. Goddard*, 2 Salk. 641; *Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 116; *Heminway v. Heminway*, 58 Conn. 443, 19 Atl. 766; *Keller v. Lewis*, 116 Ia. 369, 89 N. W. 1102; *Young v. Gormley*, 120 Ia. 372, 94 N. W. 922; *Breitenbach v. Trowbridge*, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829; *Gillespie v. Beecher*, 85 Mich. 347; *Commonwealth v. Wright*, 158 Mass. 149, 33 N. E. 82, 35 Am. St. Rep. 475, 19 L. R. A. 206; *Hoagland v. Forest Park, etc., Amusement Co.*, 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740; *O'Donnell v. McIntyre*, 118 N. Y. 156, 23 N. E. 455. The intentional taking of life in resisting a trespass can never be justified. 1 Russ. on Crimes, 220; 4th ed. 1027. *State v. Dixon*, 7 Idaho, 518, 63 Pac. 801. The owner of land is justifiable in beating a trespasser only when the battery is necessary to the defense of his property. *Stachlin v. Destrehan*, 2 La. Ann. 1019. He may not shoot one for merely driving across his land. *Everton v. Esgate*, 24 Neb. 235, 38 N. W. 794. He may remove a trespasser

from his premises, using no more force than needful for that purpose. *McCarty v. Fremont*, 23 Cal. 196; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *Woodman v. Howell*, 45 Ill. 367, 92 Am. Dec. 221; *Beecher v. Parmele*, 9 Vt. 352, 31 Am. Dec. 633; *Brothers v. Morris*, 49 Vt. 460; *People v. Payne*, 8 Cal. 341; *People v. Batchelder*, 27 Cal. 69, 85 Am. Dec. 231; *Breitenbach v. Trowbridge*, 64 Mich. 393, 31 N. W. 402. One may not strike an unarmed trespasser with a stick till one has failed in removing him by gently laying hands on him. *State v. Burke*, 82 N. C. 551. But in defending property against a trespasser who draws a deadly weapon, if one is in reasonable apprehension of danger, his use of a deadly weapon may be justifiable. *People v. Dann*, 53 Mich. 490, 51 Am. Rep. 151; *State v. Taylor*, 82 N. C. 554. See *Souther v. State*, 18 Tex. App. 352.

So in protecting possessions from trespasses of animals, only necessary force is to be used. *Thompson v. State*, 67 Ala. 106; *McIntire v. Plaisted*, 57 N. H. 606. See *Anderson v. Smith*, 7 Ill. App. 354; *Avery v. People*, 11 Ill. App. 332; *Livermore v. Batchelder*, 141 Mass. 179; *Marshall v. Blackshire*, 44 Ia. 475; *State v. Bates*, 92 N. C. 784. See, also, pp. *406-*408, and cases *post*.

A man assaulted in his dwelling

a trespass upon his land whatever the motive in doing so may be. It is not the design of the resister but the act of the trespasser which is wrongful."³⁸ One may not only *resist [*194] an aggression upon his property, but if his possession is actually invaded, he may employ force to remove the intruder, if the latter fail to go on request.³⁹ In the language of the law, his defense will be, that he laid his hands gently on the trespasser and removed him by the employment of so much force as was necessary, and no more.⁴⁰ And what one may do himself, his servants may do in his behalf.⁴¹ But if one in resisting aggression or removing an intruder exceeds the bounds of reasonable force he will be guilty of an assault.⁴² But although one is permitted to defend a right by force, it does not follow that he is at liberty to recover by force a right which is denied;⁴³ the latter can only be justified in extreme cases, such as would justify force in preventing crime or in arresting offenders.⁴⁴ It

is not obliged to retreat, but may defend his possession to the last extremity. *Pond v. People*, 8 Mich. 150; *Pitford v. Armstrong*, Wright (Ohio), 94. He may kill a burglar breaking in. *McPherson v. State*, 22 Ga. 478. See, further, *Thompson v. State*, 55 Ga. 47; *Palmore v. State*, 29 Ark. 248; *Wall v. State*, 51 Ind. 453; *State v. Stockton*, 61 Mo. 382; *State v. Abbott*, 8 W. Va. 741; *State v. Burwell*, 63 N. C. 661.

38—*Slingerland v. Gillespie*, 70 N. J. L. 720, 59 Atl. 162.

39—*Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 116; *Illinois Steel Co. v. Novak*, 84 Ill. App. 641; *Redfield v. Redfield*, 75 Ia. 435, 39 N. W. 688; *Harshman v. Rose*, 50 Neb. 113, 69 N. W. 755; *Breitenbach v. Trowbridge*, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829; *Liebstadter v. Federgreen*, 80 Hun, 245, 29 N. Y. S. 1039; *State v. Lockwood*, 1 Penn. 76, 39 Atl. 589.

40—*Harrison v. Harrison*, 43 Vt. 417; *Drew v. Comstock*, 57 Mich.

176; *Bristor v. Burr*, 120 N. Y. 427, 24 N. E. 937.

41—*Strickland v. Atlanta*, etc., R. R. Co., 99 Ga. 124, 24 S. E. 981.

42—*Chappell v. Schmidt*, 104 Cal. 511, 38 Pac. 892; *Keller v. Lewis*, 116 Ia. 369, 89 N. W. 1102; *Redfield v. Redfield*, 75 Ia. 435, 39 N. W. 688; *Everton v. Esgate*, 24 Neb. 235, 38 N. W. 794; *Harshman v. Rose*, 50 Neb. 113, 69 N. W. 755; *Emmons v. Quade*, 176 Mo. 220, 75 S. W. 103; *Haman v. Omaha Horse Ry. Co.*, 35 Neb. 74, 52 N. W. 830; *O'Connell v. Samuel*, 81 Hun, 357, 30 N. Y. S. 889.

43—*State v. Boynton*, 76 Ia. 753, 40 N. W. 84; *Concanan v. Boynton*, 76 Ia. 543, 41 N. W. 213; *Isaacs v. Flahire*, 14 Misc. 249, 35 N. Y. S. 716; *Barr v. Post*, 56 Neb. 698, 77 N. W. 123; *Kirby v. Foster*, 17 R. I. 437, 22 Atl. 1111, 14 L. R. A. 317.

44—It is no defense to an action for assault and battery that the defendant had an irrevocable license to enter upon the plaintiff's land

has been held that a tenant in common of grain may take his share by force.⁴⁵ Also that one may forthwith regain property by force which has been wrongfully taken from his possession.⁴⁶ And in Massachusetts it has been held that where a person has a right to enter upon the lands of another and there do an act, such as the removal of personal property, he may use such force as is required for the purpose, without being liable in a civil action to those who make resistance.⁴⁷

Teacher and Pupil. A school teacher, acting in a proper spirit and on a proper occasion, may, without being guilty of an assault, administer reasonable corporal punishment to a pupil, having regard to the character of the offense and to the age, sex, size and strength of the child.⁴⁸

"The books commonly assume that a teacher has the same right to chastise his pupil that a parent has to thus punish his child. But that is only true in a limited sense. The teacher has no general right of chastisement for all offences, as has the parent. The teacher's right in that respect is restricted to the limits of his jurisdiction and responsibility as a teacher. But within those limits a teacher may exact a compliance with all reasonable commands, and may, in a kind and reasonable spirit, inflict corporal punishment upon a pupil for disobedience. This punish-

to remove personal property, and that in the attempt to exercise it the plaintiff withstood him. *Churchill v. Hulbert*, 110 Mass. 42, 14 Am. Rep. 578. Citing *Sampson v. Henry*, 13 Pick. 336; *Commonwealth v. Haley*, 4 Allen, 318. One may not retake property by violence where the title is disputed. *Harris v. Marco*, 16 S. C. 575. A right of property will not justify assault and battery to regain possession wrongfully withheld. *Bliss v. Johnson*, 73 N. Y. 529.

45—*Mattice v. Scutt*, 94 App. Div. 479, 87 N. Y. S. 1009.

46—*Heminway v. Heminway*, 58 Conn. 443, 19 Atl. 766; *Commonwealth v. Donahue*, 148 Mass.

529, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L. R. A. 623.

47—*Lambert v. Robinson*, 162 Mass. 34, 37 N. E. 753, 44 Am. St. Rep. 326; and see *Low v. Elwell*, 121 Mass. 309; *Coughlin v. Gray*, 131 Mass. 56; *Stone v. Lahey*, 133 Mass. 426; *Twombly v. Monroe*, 136 Mass. 464.

48—*Boyd v. State*, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; *Dean v. State*, 89 Ala. 46, 8 So. 38; *Fox v. People*, 84 Ill. App. 270; *State v. Boyer*, 70 Mo. App. 156; *Drum v. Miller*, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528; *Mack v. Kelsey*, 61 Vt. 399, 17 Atl. 780; *State v. Thornton*, 136 N. C. 610, 48 S. E. 602.

ment should not be either cruel or excessive, and ought always to be apportioned to the gravity of the offence, and within the bounds of moderation. But, plainly, when complaint is made, the calm and honest judgment of the teacher, as to what the situation required, should have weight, as in the case of a parent under similar circumstances; and, where no improper weapon has been employed, the presumption will be, until the contrary is made to appear, that what was done was rightly done. Subject to these general rules, the teacher's right to inflict, and the duty of inflicting corporal punishment upon a pupil, and the reasonableness of such a punishment when imposed, must be judged by the varying circumstances of each particular case."⁴⁹ If the punishment is excessive or malicious, the teacher will be liable.⁵⁰

Parents, or those standing *in loco parentis*, may administer reasonable and proper chastisement to their children,⁵¹ and may depute another to do so for them, and such other will not be liable for assault.⁵² If the punishment is unreasonable or excessive, parents will be liable to the State for a criminal assault.⁵³

Spring Guns. Spring guns are sometimes set on private grounds as a defense against trespassers. The setting of these instruments is not of itself an unlawful act,⁵⁴ but if a trespasser

49—*Vannactor v. State*, 113 Ind. 276, 278-280, 15 N. E. 341, 3 Am. St. Rep. 645.

50—*State v. Long*, 117 N. C. 791, 23 S. E. 431; *Boyd v. State*, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; *Dean v. State*, 89 Ala. 46, 8 So. 38; *Fox v. People*, 84 Ill. App. 270; *State v. Boyer*, 70 Mo. App. 156; *State v. Thornton*, 136 N. C. 610, 48 S. E. 602.

51—*Hornbeck v. State*, 16 Ind. App. 484, 45 N. E. 620; *State v. Bost*, 125 N. C. 707, 34 S. E. 650; *Hewlett v. Ragsdale*, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682; *McKel-*

vey v. McKelvey, 111 Tenn. 388, 77 S. W. 664, 102 Am. St. Rep. 787.

52—*Harris v. State*, 115 Ga. 578, 41 S. E. 983; *Rowe v. Rugg*, 117 Ia. 606, 91 N. W. 903, 94 Am. St. Rep. 318.

53—See cases in last two notes. A stepmother is liable to her stepchild for a malicious assault upon the child. *Treschman v. Treschman*, 28 Ind. App. 206, 69 N. E. 961. See further as to punishments by parents and teachers, *post*, p. *198.

54—*State v. Moore*, 31 Conn. 479.

is killed or seriously injured by one, the only defense the person setting it can make is that the injury was inflicted in defense of his freehold. But the force that causes homicide or dangerous injury is clearly excessive, and, therefore, not justifiable.⁵⁵ A killing to repel a mere trespass to property is never justifiable,⁵⁶ though one may resist to any extent the forcible taking from himself, without authority of law, of that which is his own, and any criminal assault upon person or premises.

Ferocious Dogs. The use of ferocious animals in defense of property, like the use of spring guns, may, under some circumstances, be the employment of unlawful force. Much would *depend upon the circumstances, the character of [*195] the animal and the probability of his doing extreme injury.⁵⁷

What has been said of spring guns and ferocious dogs will apply to any dangerous means employed against trespassers, and by which one might be seriously injured without previous warning.

Excessive Force a Question of Fact. The question whether the force employed in defense of person, family, or property, is excessive, must generally be one of fact. Some cases are so clear that the judge would be warranted in saying that as matter of law the force was or was not excessive; but they are not numerous.⁵⁸

55—*Bird v. Holbrook*, 4 Bing. 628; *Gray v. Combs*, 7 J. J. Marsh. 478, 23 Am. Dec. 431; *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18; *Aldrich v. Wright*, 53 N. H. 398, 404, 16 Am. Rep. 339; *Grant v. Haas*, 31 Tex. Civ. App. 688, 75 S. W. 342.

56—*State v. Vance*, 17 Iowa. 138. See *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306; *State v. Dixon*, 7 Idaho, 518, 63 Pac. 801.

57—This subject will be referred to in the chapter which considers the responsibility of owners of

property for injuries done or occasioned by it.

58—*Commonwealth v. Bush*, 112 Mass. 280; *Edwards v. Leavitt*, 46 Vt. 126; *Commonwealth v. Mann*, 116 Mass. 58; *Hanson v. European, etc., R. R. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Currier v. Swann*, 63 Me. 323; *State v. Taylor*, 82 N. C. 554. An unintentional injury inflicted in self-defense and without negligence, is no assault. *Morris v. Platt*, 32 Conn. 75; *Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615. Where B. seized A. by the arm and

Damages. In estimating damages for an assault and battery the insult and indignity and injury to the plaintiff's feelings may be considered.⁵⁹ Punative damages may be given, though the act is punishable criminally.⁶⁰ If the defendant has already been convicted in a criminal proceeding for the same assault, that fact may be shown in mitigation of punitive damages.⁶¹

FALSE IMPRISONMENT.

The Nature of the Wrong. False imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion.⁶² *Prima facie* any restraint put by fear or force upon the actions of another is unlawful and [*196] constitutes a *false imprisonment, unless a showing of justification makes it a true or legal imprisonment. "False imprisonment is necessarily a wrongful interference with

swung him violently around two or three times, then letting him go, and as a result of this force he came violently against C., who, in instantly pushing him away, pushed him against a hook, whereby he was injured, it was held that B., not C., was responsible in trespass for this injury. *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267. This decision follows the celebrated squib case of *Scott v. Shepherd*, 2 W. Bl. 892, referred to, *ante*, p. *77.

59—*Reeden v. Evans*, 52 Ill. App. 209; *Cooper v. Hopkins*, 70 N. H. 271, 48 Atl. 100.

60—*Wagner v. Gibbs*, 80 Miss. 53, 31 So. 434, 92 Am. St. Rep. 598. See *Badostain v. Grajide*, 115 Cal. 425, 47 Pac. 118.

61—*Rhodes v. Rodgers*, 151 Pa. St. 634, 24 Atl. 1044; *Jackson v. Wells*, 13 Tex. Civ. App. 275, 35 S. W. 528.

62—*PATTERSON, J.*, in *Bird v. Jones*, 7 Q. B. 742, 752; *Crowell v. Gleason*, 10 Me. 325; *Rich v. McInerney*, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32; *Golibart v. Sullivan*, 30 Ind. App. 428, 66 N. E. 188; *Garnier v. Squires*, 62 Kan. 321, 62 Pac. 1005; *State v. Buxton*, 102 N. C. 129, 8 S. E. 774. A sheriff may be guilty of false imprisonment if he keeps a prisoner, lawfully arrested, in jail for thirty days without bringing him before a magistrate. *Anderson v. Beck*, 64 Miss. 113. So a party may be liable for malicious abuse of lawful process after arrest. *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95.

False imprisonment is a trespass committed by unlawful arrest and imprisonment. If the imprisonment is under legal process but the action has been begun and carried on maliciously and with-

the personal liberty of an individual. The wrong may be committed by words alone or by acts alone, or by both, and by merely operating on the will of the individual or by personal violence, or by both. It is not necessary that the individual be confined within a prison or within walls, or that he be assaulted or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation. Nor is it necessary that the wrongful act be committed with malice or ill will, or even with the slightest wrongful intention. Nor is it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard.'⁶³ Therefore, if an officer, without process or with void process, notifies a person that he arrests him, and the person so notified submits and accompanies him, this is an imprisonment.⁶⁴ "It is the fact of compulsory submission which brings a person into imprisonment; and impending and threatened physical violence, which to all appearance can only be avoided by submission, operates as effectually if submitted to as if the arrest had been forcibly accomplished without such submission. There are cases in which a party who does not submit cannot be regarded as arrested until his person is touched; but when he does submit no such necessity exists.'⁶⁵ "If the party is under restraint,

out probable cause, the wrong is malicious prosecution. *Gelzenleuchter v. Niemeyer*, 64 Wis. 316, 54 Am. Rep. 616; *Murphy v. Martin*, 58 Wis. 276; *Marks v. Townsend*, 97 N. Y. 590; *Mullen v. Brown*, 138 Mass. 114; *Herzog v. Graham*, 9 Lea, 152. See *Lewin v. Uzuber*, 65 Md. 341. If the arrest is unlawful, malice need not be shown. *Chrisman v. Carney*, 33 Ark. 316.

As to joint liability of officer or attorney or magistrate in false imprisonment, see cases *supra*, p. 215 n. 16, 222 n. 37. The party and

attorney are protected if the writ protects the officer. *Wheaton v. Beecher*, 49 Mich. 348; *Hill v. Taylor*, 50 Mich. 549. The burden of proof to show the imprisonment lawful is on the defendant. *Hicks v. Faulkner*, L. R. 8 Q. B. D. 167; differing from the rule in malicious prosecution.

63—*Garnier v. Squires*, 62 Kan. 321, 62 Pac. 1005; *Comer v. Knowles*, 17 Kan. 436.

64—*Callahan v. Searles*, 78 Hun, 238, 28 N. Y. S. 904.

65—*CAMPBELL, J.*, in *Brushaber v. Stegemann*, 22 Mich. 266, 269.

and the officer manifests an intention to make a caption, it is not necessary there should be actual contact."⁶⁶ A submission to reasonably apprehended force is sufficient to constitute unlawful imprisonment, though no force is used or threatened.⁶⁷ If the person is not touched, it is necessary to show a threat or intent to arrest.⁶⁸ Just as little will constitute imprisonment by others than officers.^{68a} To tell one on a ferry that he shall not leave it until a certain demand is paid, is an imprisonment if one submits through fear, though the person is not touched and no actual violence offered.⁶⁹ But it is no imprisonment to turn one from the way he desires to go, if he is not otherwise restrained, and is at liberty to go back or to go elsewhere than in the direction he was started in. It is a wrong which may be redressed in an action on the case, but it is not an imprisonment.⁷⁰ A train crew took a boy, who had had his foot crushed under the train, against his protest, to a hospital, and there, in the presence of his uncle his foot was amputated by the company's surgeon. The case was urgent and the boy's parents could not be reached without considerable delay. In a suit by the boy, it was held that neither the company nor the members of the crew were liable for false imprisonment.⁷¹

Any arrest or detention of a person is presumed to be unlaw-

And, see, *Pike v. Hanson*, 9 N. H. 491.

66—*VAUGHAN, J.*, in *Granger v. Hill*, 4 Bing. (N. C.) 212, 222. And, see, *Bird v. Jones*, 7 Q. B. 742; *Warner v. Riddiford*, 4 C. B. (N. S.) 180. While manual seizure is not necessary to constitute an arrest, there must be that or its equivalent in some sort of personal coercion. *Hill v. Taylor*, 50 Mich. 549.

67—*Bingham v. Lipman*, 40 Ore. 363, 67 Pac. 98.

68—*Greathouse v. Summerfield*, 25 Ill. App. 296.

68a—*Field v. Kane*, 99 Ill. App. 1; *McDonald v. Franchere Bros.*,

102 Ia. 496, 71 N. W. 427; *Stevens v. O'Neill*, 51 App. Div. 364, 64 N. Y. S. 663.

69—*Smith v. State*, 7 Humph. 43, 45. Shutting up in a room, threatening with weapons to extort a promise, is false imprisonment. *Hildebrand v. McCrum*, 101 Ind. 61. But it is not if one goes with another voluntarily though hoaxed. *State v. Lunsford*, 81 N. C. 528.

70—*Bird v. Jones*, 7 Q. B. 742. But see, *Harkins v. State*, 6 Tex. App. 457.

71—*Oillet v. Pittsburg, etc., Ry. Co.*, 201 Pa. St. 361, 50 Atl. 1011.

ful and the burden is on the defendant to show it was lawful.⁷²

***Restraints in Certain Relations.** The justification of [*197] imprisonment may be either under process or without process. In certain relations a degree of restraint is permitted by the law, for which no writ or legal process of any sort is usually required. The following are the cases referred to: The parent in respect to the child, the guardian in respect to the ward, the master in respect to his apprentice, the teacher in respect to his pupil, and the bail in respect to his principal. The latter it is usual to regulate by statute, and one of the regulations is, that arrest and imprisonment, shall not take place without the exhibition of proper papers showing the relation and the rights under it. The others are cases resting upon principles which are so familiar that little need be said concerning them here. Restraints are admissible within such limits as the parent, guardian, teacher, or master, in the exercise of a sound discretion, may decide to be necessary. To a certain extent a judicial power is vested in him which others are not at liberty to interfere with, except in a case of manifest abuse. To take by itself the case of the parent, though the old ideas regarding the need of severity and strict discipline have to a large extent passed away, the father may still not only restrain the liberty of his infant child, but he may, as reason shall seem to him to require, inflict corporal punishment for misbehavior. The limit to his authority is that uncertain limit that the correction must be moderate, and dictated by reason and not by passion.⁷³ If he plainly exceeds all bounds, he is liable to criminal prosecution, but it seems never to have been held that the child might maintain a personal action for his injury. In principle there seems to be no reason why such an action should not be sustained; but the policy of permitting actions that thus invite the child to con-

72—*Jackson v. Knowlton*, 173 Mass. 94, 53 N. E. 134; *Barker v. Anderson*, 81 Mich. 508, 45 N. W. 1108; *Hicks v. Faulkner*, L. R. 8 Q. B. D. 167.

73—*Johnson v. State*, 2 Humph. 283; *Winterburn v. Brooks*, 2 C. & K. 16.

test the parent's authority is so questionable, that we may well doubt if the right will ever be sanctioned.

A guardian of the *person* of his ward has a right of personal restraint corresponding to that of the parent, but without, in general, the power of chastisement. That power would probably be possessed in extreme youth if the ward were received into the family of the guardian, who thus was placed, in respect to him, *in loco parentis*.

[*198] *The relation of master and apprentice is formed under statutes, and these give the master the authority he possesses. A power of restraint to a limited extent, to compel performance of duties under the articles, he probably possesses, but it is not clear that this is true generally. By the English law the master possessed the authority of moderate personal chastisement when his judgment advised it.⁷⁴

The teacher to whom a child is committed by his parents or guardian has also the right of restraint, and even of punishment, to compel obedience to lawful orders. Like the parent's, the authority must be exercised with moderation, and while all presumptions favor the correctness of his action,⁷⁵ yet, in a clear case of abuse of authority, he may be held liable as for a criminal assault, and also in a civil suit for damages.⁷⁶

The authority of the bail in respect to his principal, for whose conduct he has become responsible, is to arrest and surrender

74—See *Penn v. Ward*, 2 C. M. & R., 338. One employed for another under contract for service is not liable to punishment by the master. *Schouler Dom. Rel.* 616; *Mathews v. Terry*, 10 Conn. 455.

75—*Cooper v. McJunkin*, 4 Ind. 290; *State v. Pendergrass*, 2 Dev. & Bat. 365, 31 Am. Dec. 416; *Commonwealth v. Randall*, 4 Gray, 36; *Hathaway v. Rice*, 19 Vt. 102; *Sheehan v. Sturges*, 53 Conn. 481; *Danenhoffer v. State*, 69 Ind. 295. Not liable for error of judgment when he has acted in good faith. *Heritage v. Dodge*, 64 N. H. 297,

9 Atl. 722; *Fertich v. Michener*, 111 Ind. 472. Not liable for false imprisonment in detaining a pupil a short time after school hours. *Id.*

76—*Commonwealth v. Randall*, 4 Gray, 36; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156; *Patterson v. Nutter*, 78 Me. 509, 57 Am. Rep. 818. It has been held that if the child's parent gives him directions what to do, the teacher has no right to punish the child for obeying them. *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471. At

him in exoneration of his liability. It is a limited authority and must be exercised without needless violence or annoyance.⁷⁷

Circumstances may place one in authority over another, when restraint would not only become excusable, but a duty. Thus, the safety of a ship, its passengers and crew, might depend upon the strict subordination of all persons on board; and all persons must then, of necessity, submit themselves to the proper orders of the master.⁷⁸

***Requisites of Legal Process.** Excepting the cases already named, and a few more which will be referred to further on, whoever would justify an arrest must have legal process duly emanating from some judicial authority. This process must be pleaded, and it must have certain requisites, in order to render it available as a defense. Speaking generally, these requisites are the following: It must have been issued by a court or officer having authority of law to issue such process, and there must be nothing on the face of the process apprising the officer to whom it is delivered for service, that in the particular case there was no authority for issuing it.⁷⁹ When the process will bear this test, the officer is protected in obeying its command.⁸⁰

least in the absence of a compulsory education law. *State v. Misner*, 50 Ia. 145. If such directions interfered with school regulations, expulsion would seem to be the proper remedy. See *ante*, p. *194.

77—See *Cooley*, Const. Lim. 341, and note.

78—*Brown v. Howard*, 14 Johns. 119; *Flemming v. Ball*, 1 Pay. 3.

79—*Rousey v. Wood*, 47 Mo. App. 465; *Rousey v. Wood*, 57 Mo. App. 650.

80—*Leib v. Shelby Iron Co.*, 97 Ala. 626, 12 So. 67; *O'Neal v. McKenna*, 116 Ala. 606, 22 So. 905; *Tidball v. Williams*, 2 Ari. 50, 8 Pac. 351; *Martin v. Collins*, 165 Mass. 256, 43 N. E. 91; *Schultz v.*

Huebner, 108 Mich. 274, 66 N. W. 57; *Miller v. Hahn*, 116 Mich. 607, 74 N. W. 1051; *Atwood v. Atwater*, 43 Neb. 147, 61 N. W. 574; *Hann v. Lloyd*, 50 N. J. L. 1, 11 Atl. 346; *Gilbert v. Satterlee*, 43 Misc. 292, 88 N. Y. S. 871; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084; *Gaines v. Newbrough*, 12 Tex. Civ. App. 466, 34 S. W. 1048; *Marks v. Sullivan*, 9 Utah, 12, 33 Pac. 224; *King v. Johnston*, 81 Wis. 578, 51 N. W. 1011. "If the court, out of which the writ issued, has, by its constitution and fundamental laws, jurisdiction—that is, power to take cognizance of and determine such a cause of action as that in which the process was awarded—

As the rules of protection by process are the same, whether unlawful restraint upon the person is in question, or unlawful intermeddling with goods, it will be convenient to postpone a particular consideration of them until trespasses to property are discussed. In this place only a very few general rules will be mentioned.

1. A writ may be absolutely void because it does not emanate from the court or officer purporting to issue it. This may happen because it is forged, or because some unauthorized person has assumed to fill out and issue process in the name of a magistrate. It has been decided in New York, and also in Illinois, that if a justice of the peace, who, by law, has authority to issue writs in person, shall deliver blanks to an officer, with leave to fill them up at discretion, and then issue them, such permission would be void, and the writs issued in pursuance of it nullities.⁸¹ It should be said that in those States the justice is the clerk of his court, as well as the judge of it.

2. A writ may be void because it proceeds from a court or magistrate having, by law, no jurisdiction of the subject matter, either generally, or to the extent to which it has been assumed. Illustrations of this will be given in another place. It is enough to say now, that when this defect exists, it will generally [*200] appear *on the face of the proceeding, though the rule is by no means universal.⁸²

3. The writ may also be void because it emanates from an in-

and authority of law to issue process of that nature, either generally or in particular cases, and the writ be regular on its face, the writ itself will be a full justification for acts done by the officer in its lawful execution." *Jennings v. Thompson*, 54 N. J. L. 56, 22 Atl. 1008.

81—*Pierce v. Hubbard*, 10 Johns. 405; *People v. Smith*, 20 Johns. 63; *Rafferty v. People*, 69 Ill. 111; *S. C.* 72 Ill. 37, 18 Am. Rep. 601. See, also, *Burslem v. Fern*, 2 Wils. 47. Where one has caused the arrest

of a person on one charge and the justice changes the charge and inflicts a fine for something else, the complainant is not liable for damage arising from the illegal acts of the justice. *Frankfurter v. Bryan*, 12 Ill. App. 549.

82—See *Tellefsen v. Fee*, 168 Mass. 188, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481; *Strozzi v. Wines*, 24 Nev. 389, 55 Pac. 828; *Swart v. Rickard*, 74 Hun. 339, 26 N. Y. S. 408; *Lueck v. Heister*, 87 Wis. 644, 58 N. W. 1101; *Holz v.*

ferior court or officer, whose jurisdiction is never presumed, but must be shown, and is not shown on the face of the proceedings.⁸³ In such cases there may have been jurisdiction in fact, but because it is not shown, it is as if it did not exist. If, for example, a magistrate issues a warrant for committing one to prison without reciting therein an accusation, a trial, and a conviction, he issues a process which is apparently unwarranted, and the officer to whom it is delivered is bound to know that he would not be protected in serving it.⁸⁴

Rediske, 116 Wis. 353, 92 N. W. 1105. But where the jurisdiction depends not on matter of law, but on matter of fact which the court or magistrate is to pass upon, the decision upon it is conclusive, and a protection not only to the officer serving process, but to the court or magistrate also. *Brittain v. Kinnard*, 1 Brod. & B. 432; *Mather v. Hood*, 8 Johns. 44; *Mackaboy v. Commonwealth*, 2 Virg. Cas. 268; *Clarke v. May*, 2 Gray, 410; *State v. Scott*, 1 Bailey, 294; *Wall v. Trumbull*, 16 Mich. 228; *Sheldon v. Wright*, 5 N. Y. 497; *Freeman on Judgments*, § 523, and cases cited; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Bocock v. Cochran*, 32 Hun, 521. See, *Goodwine v. Stephens*, 63 Ind. 112. The party who does nothing but make the complaint is not liable though in fact there is no jurisdiction. *Langford v. Boston, etc., Co.*, 144 Mass. 431. Unless in the affidavit for the writ there is entire lack of evidence of a jurisdictional fact. *Dusy v. Helm*, 59 Cal. 188. But where a justice upon a complaint showing on its face that the offense charged was barred by time, issues process and commits the prisoner, he is liable. *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758. And one may be liable who

draws up complaint and warrant, takes latter from the magistrate and gives it to the officer with orders to arrest at any cost. *Loomis v. Render*, 41 Hun, 268. If an order of arrest is made by a judge having jurisdiction, the party and attorney is protected though the order be set aside afterward or reversed on appeal. *Marks v. Townsend*, 97 N. Y. 590; *Bamberger v. Kahn*, 43 Hun, 411; *Fischer v. Langbein*, 103 N. Y. 84.

83—*Jacques v. Parks*, 96 Me. 268, 52 Atl. 763.

84—The officer is bound to know the law, and that his writ is bad on its face, if such is the fact. *Grumon v. Raymond*, 1 Conn. 39, 6 Am. Dec. 200; *Lewis v. Avery*, 8 Vt. 287; *Clayton v. Scott*, 45 Vt. 386. So if examining magistrate convicts and constable takes to jail. *Patzack v. Von Gerichten*, 10 Mo. App. 424. In serving a valid process, he is liable only for acts not authorized by it. *Gage v. Barnes*, 11 Vt. 195; *Churchill v. Churchill*, 12 Vt. 661. But for such acts as he may be treated as a trespasser. *Coffin v. Field*, 7 Cush. 355; *Morse v. Reed*, 28 Me. 481; *Smith v. Gates*, 21 Pick. 55; *Gordon v. Clifford*, 28 N. H. 402; *Cate v. Cate*, 44 N. H. 211. This is so, even where that which he did was

[*201] *4. The writ may also be void for many other reasons, such as that it is tested of a Sunday or other day which is *dies non* for such process, or that it was issued without compliance with some statutory requisite which is a condition precedent and shows the defect on its face, or for other defects, which will be more particularly referred to hereafter. It is enough to repeat here that the writ which an officer can justify himself in serving must be a valid writ and that those concerned in issuing it must be able by the law to justify its issue.

Arrest Without Warrant. There are sometimes circumstances which in themselves are a command of arrest as imperative as could be any command by official authority. These cases, in general, are plain, and they rest upon the inherent right of society to defend itself against sudden assaults, not by regular proceedings merely, but, in emergencies, by the spontaneous action of its members.

In all civil cases it is not supposed that public justice will suffer, or that any one can be seriously injured or incommoded by any such delay in arresting a wrong-doer as may be requisite to obtain proper legal process. Neither, in general, can any similar delay be supposed prejudicial in the case of minor offenses against the State. But it may be reasonably expected that a felon will flee from justice if an opportunity is afforded him, and also that, if he knows he is suspected, he will do what may be in his power to obliterate the evidences of his crime. In these circumstances are found forcible reasons for prompt action in his arrest; but the reasons would be still more imperative if the criminal conduct was discovered before the crime was complete. If one were detected in maliciously setting fire to his neighbor's house, the moral obligation to make immediate arrest, and the legal right to do so would be equally plain. They might not be so imperative or so clear in the case of some other felonies, but the difference would be in degree only.

done by command of his official superior, who, in giving the command, exceeded his lawful authority. *Griffin v. Wilcox*, 21 Ind. 370; *Jones v. Commonwealth*, 1 Bush 34, 89 Am. Dec. 605.

When the propriety of an arrest without process is in question, the problem always is how to harmonize the individual right to liberty with the public right to protection. Where process issues, the proceedings required in obtaining it constitute a sufficient precaution against causeless arrests: the magistrate decides on the facts presented to him that sufficient *reason exists. But if one without this protection were to arrest upon his own judgment, he ought to be able, when called upon, to show that his judgment was warranted. To do this he should show either—

1. A felony actually committed; and
2. Facts that have come to his knowledge which justified him in suspecting the person arrested to be the felon; or
3. A felony being committed, and an arrest to stay and prevent it.⁸⁵

85—*Ruloff v. People*, 45 N. Y. 213; *Keenan v. State*, 8 Wis. 132; *Neal v. Joyner*, 89 N. C. 287; *Union Depot R. R. Co. v. Smith*, 16 Colo. 361, 27 Pac. 329; *Hight v. Naylor*, 86 Ill. App. 508; *Garnier v. Squires*, 62 Kan. 321, 62 Pac. 1005. In the last case the court says: "An arrest by an officer of the law without a warrant will not constitute false imprisonment if the officer arresting has reasonable grounds to believe that a felony has been committed; but a private person arrests without a warrant at his peril, and it will be a false imprisonment unless it can be shown that a felony has actually been committed." p. 325. In *Candiff v. Louisville, etc., Ry. Co.*, 42 La. Ann. 477, 7 So. 601, it was held that where one detects a felon in the act and shoots him as he tries to escape there is no liability for his injury or death. A citizen may arrest on fresh pursuit one seen pocket-picking. *Kennedy v. State*, 107 Ind. 144. If one

causes an officer to arrest, without warrant, a person for a misdemeanor not committed in the officer's presence, he cannot escape liability unless the charge is well founded. *McGarrahan v. Lavers*, 15 R. I. 302, 3 Atl. 592; *Taafe v. Slevin*, 11 Mo. App. 507. So, if one, not an eye witness, causes an officer to arrest for such misdemeanor, he is liable. *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695. Where an officer arrested a woman and took her to the station on no other justification than that of vague hearsay and suspicion of a third person that she had had something to do with making way with a missing person, the officer himself making no inquiry whatever into the facts, the arrest was held totally unwarranted. *Somerville v. Richards*, 37 Mich. 299. An arrest by a constable out of his jurisdiction must be regarded as an arrest without warrant, even though he may have a warrant which commanded the arrest with-

This seems to be the least that could be required; the fact of felony, and personal knowledge of the guilt of the particular person, or reason for suspecting him; and if one errs in these particulars, it is better that he be left to take the consequences, than that they be visited upon an innocent party who is improperly arrested.⁸⁶ Some authorities lay down the rule that a private person arrests for felony at his peril, and that, to justify the arrest, he must show that a felony has been committed and that the person arrested committed it.⁸⁷ But a peace officer may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made on reasonable grounds of belief, he will be excused, even though it appear afterwards that in fact no felony had been committed.⁸⁸

[*203] *Forcible breaches of the peace, in affrays, riots, etc., are placed, as regards arrest without warrant, on the footing of felonies. The reason for this is found in their ten-

in his jurisdiction. *Krug v. Ward*, 77 Ill. 603.

86—*Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702; *Commonwealth v. Deacon*, 8 S. & R. 47; *State v. Roane*, 2 Dev. 58; *Brockway v. Crawford*, 3 Jones N. C. 434, 67 Am. Dec. 250; *Eanes v. State*, 6 Humph. 53, 44 Am. Dec. 289; *Long v. State*, 12 Ga. 293; *Reuck v. McGregor*, 32 N. J. 70; *State v. Holmes*, 48 N. H. 377; *Karner v. Stump*, 12 Tex. Civ. App. 460, 34 S. W. 656.

87—*Palmer v. Maine Cent. R. R. Co.*, 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; *Enright v. Gibson*, 219 Ill. 550.

88—*Marsh v. Loader*, 14 C. B. (N. S.) 535; *Lawrence v. Hedger*, 3 Taunt. 14; *Davis v. Russell*, 5 Bing. 354, 365; *Wakely v. Hart*, 6 Binn. 316; *Burns v. Erben*, 40 N. Y. 463; *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702; *Rohan v.*

Sawin, 5 Cush. 281; *Drennan v. People*, 10 Mich. 169; *State v. Underwood*, 75 Mo. 230; *Union Depot & R. R. Co. v. Smith*, 16 Colo. 361, 27 Pac. 329; *Harness v. Steele*, 159 Ind. 286, 64 N. E. 875; *Palmer v. Maine Cent. R. R. Co.*, 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Firestone v. Rice*, 71 Mich. 377, 37 N. W. 303, 15 Am. St. Rep. 266; *Diess v. Mallon*, 46 Neb. 121, 64 N. W. 722, 50 Am. St. Rep. 598; *Thompson v. Fisk*, 50 App. Div. 71, 63 N. Y. S. 352. In such case probable cause is a question of law depending on the reasonable belief of the party. *McCarthy v. DeArmit*, 99 Pa. St. 63; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089. If one undertakes to justify an arrest as an officer he must show that he was an officer *de jure*, "that he was duly and legally qualified to

decey to lead to serious, and perhaps fatal injuries.⁸⁹ Peace officers are also allowed, without warrant, to enforce the ordinary laws of police by the arrest of vagrants, and drunken and disorderly persons, detaining them for the action of the proper police magistrates.⁹⁰ And it is said, by an old writer on criminal law, that "it hath been adjudged that any one may apprehend a common, notorious cheat, going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of the peace, for the public good requires the utmost discouragement of all such persons, and the restraining of private persons from arresting them

act as such officer." *Short v. Symmes*, 150 Mass. 298, 23 N. E. 42, 15 Am. St. Rep. 204.

89—*Respublica v. Montgomery*, 1 Yeates, 419; *City Council v. Payne*, 2 N. & McCord. 475; *State v. Brown*, 5 Harr. (Del.) 505; *Phillips v. Trull*, 11 Johns. 487; *Vandeveer v. Mattocks*, 3 Ind. 479; *Palmer v. Maine Cent. R. R. Co.*, 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; *Baltimore, etc., R. R. Co. v. Cain*, 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688; *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215. The officer may so arrest to prevent a threatened breach of the peace. *Hayes v. Mitchell*, 80 Ala. 183. But not for a past breach not committed in his presence. *Quinn v. Heisel*, 40 Mich. 576. *Way's Case*, 41 Mich. 299; *People v. Haley*, 48 Mich. 495. So generally as to past misdemeanor; *People v. McLean*, 68 Mich. 480, 36 N. W. 231. But he may upon fresh pursuit for an offense less than felony though not committed in his view. *State v. Sims*, 16 S. C. 486. Even if the offense is committed in his presence he may not delay five hours before attempting

to arrest. *Wahl v. Walton*, 30 Minn. 506. A deputy sheriff cannot arrest for past misdemeanor where a warrant has been issued if he does not have it in his possession at the time. *People v. McLean*, 68 Mich. 480, 36 N. W. 231. An officer is not justified in arresting, upon a letter or telegram from a peace officer of another county or state, without warrant where a misdemeanor is charged. *Manning v. Mitchell*, 73 Ga. 660, or an offense not a crime by the laws of his own state. *Malcolmson v. Scott*, 56 Mich. 459.

90—*Beville v. State*, 16 Tex. App. 70; *Wiltse v. Holt*, 95 Ind. 469. But the fact that one at the time orderly has been recently intoxicated is no justification for arrest without warrant. *Newton v. Locklin*, 77 Ill. 103. In Massachusetts if an officer arrests for drunkenness one in fact not drunk, he is liable civilly. *Phillips v. Fadden*, 125 Mass. 198, but not criminally. *Com. v. Cheney*, 141 Mass. 102, 55 Am. Rep. 448. If a peace officer arrests one without warrant on an oral complaint by another, and handcuffs and confines him, he will be held liable

without a warrant from a magistrate would often give them an opportunity for escaping.'⁹¹ These remarks will [*204] apply to professional *gamblers and cheats on the public thoroughfares; if they are found plying their unlawful vocation there, they are properly and justly classed with night walkers and other persons without reputable means of support, and who prey in one form or another on the public. Except in cases of breaches of the peace, the general rule is that a private person cannot arrest without warrant for a misdemeanor or the violation of an ordinance and that peace officers can only make such arrests when the offense was committed in view of the officer.⁹² In Georgia it is said that an officer may not arrest for a misdemeanor, without a warrant, unless the offense was committed in his presence, or unless the offender was endeavoring to escape, or there was likely to be a failure of justice for want of a magistrate to issue a warrant.⁹³ An officer may not arrest without warrant for a misdemeanor committed in another state,⁹⁴ nor for a past misdemeanor committed in his own state.⁹⁵

for false imprisonment, if it turns out that he was innocent. *Griffin v. Coleman*, 4 H. & N. 265. See *Ross v. Leggett*, 61 Mich. 445, 23 N. W. 675.

91—*Hawk P. C.* 2 c. 12, § 20. That one in the night time, disobeying the orders of the city board of health, in a manner dangerous to the public health, may be arrested without warrant, see *Mitchell v. Lemon*, 34 Md. 176.

92—*Gambill v. Schmuck*, 131 Ala. 321, 31 So. 604; *Union Depot & R. R. Co. v. Smith*, 16 Colo. 361, 27 Pac. 329; *Bright v. Patton*, 5 Mackey 534, 60 Am. Rep. 396; *Markey v. Griffin*, 109 Ill. App. 212; *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100; *Curran v. Taylor*, 92 Ky. 537, 18 S. W. 232; *Palmer v. Maine Cent. R. R. Co.*, 92 Me. 399, 42 Atl. 800,

69 Am. St. Rep. 513, 44 L. R. A. 673; *Baltimore, etc., R. R. Co. v. Cain*, 81 Md. 87, 31 Atl. 801; *Parkerton v. Verberg*, 78 Mich. 573, 44 N. W. 579, 18 Am. St. Rep. 473, 7 L. R. A. 507; *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; *Webb v. State*, 51 N. J. L. 189, 17 Atl. 113; *Parick v. McManomon*, 17 Pa. Supr. Ct. 154. See *White v. McQueen*, 96 Mich. 249, 55 N. W. 843.

93—*Franklin v. Amerson*, 118 Ga. 860, 45 S. E. 698.

94—*Scott v. Eldridge*, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379.

95—Ibid.; *Quinn v. Heisel*, 40 Mich. 576; *Way's Case*, 41 Mich. 299; *People v. Haley*, 48 Mich. 495; *People v. McLean*, 68 Mich. 480, 36 N. W. 231; ante, p. 307 n. 89.

Though an arrest without a warrant has been legally made, yet if the officer lets the prisoner go or detains him an unreasonable time without procuring a proper warrant or order for his detention, he will be a trespasser from the beginning and liable for false imprisonment.^{95a} Upon this point the supreme court of Indiana expresses itself as follows: "By the rules of the common law a peace officer when he had reasonable or probable cause to believe that a felony had been committed, might arrest the accused person without a warrant; and for making such an arrest he was justified, although subsequently it appeared that the party was not guilty of committing the offense. But the power of detaining the person so arrested, or restraining him of his liberty, in such a case is not a matter within the discretion of the officer making the arrest. He cannot legally hold the person arrested in custody for a longer period of time than is reasonably necessary, under all of the circumstances of the case, to obtain a proper warrant or order for his further detention from some tribunal or officer authorized under the law to issue such a warrant or order. If the person arrested is detained or held by the officer for a longer period of time than is required under the circumstances, without such warrant or authority, he will have a cause of action for false imprisonment against the officer and all others by whom he has been unlawfully detained and held."^{95b}

Imprisonment of Insane Persons. The imprisonment of persons alleged to be insane is likely, in some cases, to lead to injustice, and demands some special attention. In the vast majority of cases in which persons are restrained of their liberty for supposed insanity, there has been no adjudication whatever. The

95a—*Harness v. Steele*, 159 Ind. 286, 64 N. E. 875; *Stewart v. Feeley*, 118 Ia. 524, 92 N. W. 670; *Twilley v. Perkins*, 77 Md. 252, 26 Atl. 286, 39 Am. St. Rep. 408, 19 L. R. A. 632; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Martin v. Golden*, 180 Mass. 549, 62 N. E. 977; *Anderson v. Beck*, 64 Miss. 113; *Pastor v. Regan*, 9 Misc. 547, 30 N. Y. S. 657; *Leger v. Warren*, 62 Ohio St. 500, 57 N. E. 506, 78 Am. St. Rep. 738, 51 L. R. A. 193; *Newby v. Gunn*, 74 Tex. 455, 12 S. W. 67. Compare *Mulberry v. Fuelhart*, 203 Pa. St. 573, 53 Atl. 504.

95b—*Harness v. Steele*, 159 Ind. 286, 295, 64 N. W. 875.

father discovers that his child is disordered in mind, and he places him in an asylum. The husband does the same with his wife, or the wife with her husband. Generally this is proper and commendable, if affection or a sense of duty has prompted and governed the action; but when there is no legal supervision, it is always possible that the motive may be a base instead of a just one. The difficulty of obtaining redress in such cases is sufficiently serious to require most careful consideration for the general subject.

The rights and liabilities of parties in the cases of such confinement may be considered under two heads:

1. When there has been no adjudication.
2. When an adjudication has taken place and a judicial declaration of insanity has resulted.

Under the right of self-defense there must undoubtedly be authority to seize and restrain any person incapable of controlling his own actions, and whose being at large endangers the safety or property of others.⁹⁶ Humanity requires that the restraint should be suited to the unfortunate condition, and should have in view the restoration to reason, if that be possible; but regulations for that purpose must be by the arrangement of parties concerned, or they must be prescribed by law. Where an arrest is made merely for protection, it is only required of the person making it that he treat the person arrested [*205] with the utmost *kindness and consideration consistent with the safety of others, and that he do no more in imposing restraint than protection requires. But he must make sure of his facts, and be certain that they will justify him. As in arresting a supposed felon, so in this case, it is not an honest belief on his part, or purity of motive, that can afford protection: he assumes to be both accuser and judge, and the consequences of any error are very properly visited upon him.⁹⁷ If

96—Every man for his own protection may restrain the fury of a lunatic. *Brookshaw v. Hopkins*, N. H. 30, 49 Am. Rep. 304. Lofft. 235. This right ceases when the seizure is no longer reasonably necessary. *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304.

97—Look *v. Dean*, 108 Mass.

there is no insanity, the party arrested may rightfully resist, even to the extent of inflicting fatal injuries; and he may recover exemplary damages for the injury and disgrace which he suffers in the attempt to fix upon him the stigma and the disabilities of mental unsoundness.

But not every insane person is a dangerous person. Nothing can be more harmless to others than a person afflicted with some of the milder forms of insanity. If self-protection, and not the benefit of the supposed insane person, is made the justification for confinement without adjudication, it must wholly fail in such cases.⁹⁸ It is not insanity that excuses, but insanity of a type that impels the person to acts which endanger the rights of others. If the State has made provision for the care of insane persons, it will be proper to commit them to such asylums as may have been provided, but if either private individual or officer shall take the responsibility of doing this without previous adjudication, he must take on his personal responsibility the risk of all errors.

It is sometimes provided by statute that no one shall be restrained of his liberty as an insane person except upon the certificate of a reputable physician, or, perhaps, of more than one. Such a certificate may prevent injustice in some cases, but as a physician is not a judicial officer, and has no judicial powers, it is not an adjudication and cannot be given the force of law so as to protect parties who imprison one not insane in fact.⁹⁹ It might assist in showing that the parties had acted in good faith, and therefore ought not to be visited with exemplary damages; *but it could not bind the party whose reason [*206] had been condemned without a hearing. Nothing but a judicial investigation, instituted for the purpose of trying the

116, 11 Am. Rep. 323; *Emmerick v. Thorley*, 35 App. Div. 452, 54 N. Y. S. 791; *Washer v. Slater*, 67 App. Div. 385, 73 N. Y. S. 425. The fact that a deputy constable acted under the orders of his principal is no excuse. *Id.*

98—*Anderson v. Burrows*, 4 C. & P. 210; *Scott v. Wahan*, 3 Fost. & Finl. 328; *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323; *Lott v. Sweet*, 33 Mich. 308. See *Commonwealth v. Kirkbride*, 3 Brewster, 586.

99—See *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633.

question of sanity, and in which the supposed *non compos* is allowed the opportunity of being heard, can conclude him.¹ If a physician intentionally gives a false certificate whereby a person is confined in an asylum, he is liable for false impris-

1—Those cases in which one has committed an act which, in a sane person, would be a crime, and has been acquitted on the ground of insanity, are always embarrassing. If the verdict is right on the facts, the principle on which he is acquitted is plain enough. No one can commit a crime who is incapable of harboring a criminal intent. The difficult question concerns what shall be done with him afterward. And one would naturally suppose that this question ought not to be a difficult one. If a person, from mental disease, is unable to control his own actions, and is impelled by delusions or frenzy to commit violence upon others, he ought to be subjected to legal restraint.

The popular belief is, however, that a large proportion of these cases the defense of insanity was a fraud, or at least the suggestion of insanity has been seized upon as an excuse for discharging a guilty person for whose acquittal the jury could suggest no other reason. This belief has subjected the administration of the law to much criticism; and by some unthinking people the law itself is assailed. The fault in such cases is that the jury, improperly actuated by sympathy, assign one reason for an acquittal, when the real reason is something quite different. They say, "We acquit because of insanity," when in their hearts they mean, "We acquit because we think the act excusable

on grounds the law does not accept as an excuse." They assign a valid excuse because they know the real excuse is not valid. Shall a party thus excused be turned loose upon society? This is the problem. Certainly if he is insane he ought not to be, and the verdict of the jury must be accepted as conclusive that at the time to which their inquiry was directed he was insane in fact. But that time was not the time of the trial; it was the time of the alleged criminal act. Suppose, now, it be provided by legislation that a person thus acquitted shall be committed to an asylum as a permanent inmate; is this admissible?

The difficulties in the way of such legislation are the following: 1. There has as yet been no adjudication that the person at the time of acquittal is insane, and, if not, he cannot lawfully be confined. An insanity which has passed away cannot excuse an imprisonment. 2. If it be allowable to assume that an insanity found to exist at one time still continues, and on that ground to commit the party to an asylum as presumptively insane, still the supposed *non compos* would have a right to disprove this presumption at any time. To deny him the right to have his case investigated on the facts at any time, would be to distinguish his case from that of other insane persons; and this must be justified on some legal ground. It certainly could not be

onment.² If the certificate is given in good faith but is erroneous, his liability depends upon whether he was negligent in the matter and the burden is on the plaintiff to show such negligence.³ If a person procures another, who is not insane, to be arrested and committed to an insane asylum, he will be liable for malicious prosecution and the order of commitment is held not to be conclusive on the question of sanity.⁴

*But an insane person, without any adjudication, may [*207] also lawfully be restrained of his liberty for his own benefit, either because it is necessary to protect him against a tendency to suicide or to stray away from those who would care for him, or because a proper medical treatment requires it. The restraint for this purpose may be imposed under the direction of those who, by reason of relationship, are the proper custod-

justified on the ground that the jury had rendered an improper verdict; the verdict must be taken as correct. But as no other ground can possibly be suggested, it must follow that the restraint of liberty, though based upon a verdict which found the existence of insanity, must be made to cease whenever a judicial investigation, which is a matter of right, shall determine that insanity does not exist. It is not possible constitutionally to provide that one shall be imprisoned as an insane person who can show that he is not insane at all. Neither is it competent to order one confined until certain designated officers, on their voluntary investigation, shall certify that reason is restored. *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633. If these cases are mischievous, the remedy is to be found in a correction of the public sentiment which tolerates, and indeed invites, improper convictions, and not in setting aside fundamental principles.

Selectmen and overseers of the poor have no authority *ex officio* to control and restrain persons of unsound mind. Like all other persons they may, from the necessity of the case, confine them for a reasonable time to prevent mischief, until proper proceedings can be had for the appointment of a guardian. No one can confine an insane person indefinitely, except under the sanction and upon compliance with the formalities of the law. *Colby v. Jackson*, 12 N. H. 526.

2—*Bacon v. Bacon*, 76 Miss. 458, 24 So. 968.

3—*Ayers v. Russell*, 50 Hun, 282, 3 N. Y. S. 338; *Williams v. Le Bar*, 141 Pa. St. 149, 21 Atl. 525.

4—*Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104; *Smith v. Nippert*, 76 Wis. 86, 44 N. W. 846, 20 Am. St. Rep. 26; *Smith v. Nippert*, 79 Wis. 135, 48 N. W. 253.

ians of the person, or by the State acting through its proper officers.⁵

What is said here concerning persons insane will apply to all who, by reason of disease or mental infirmity of any sort, are incapable of subjecting their actions to the control of reason.

Liability for False Imprisonment Under Various Conditions—Illustrative Cases. Where a person is arrested or imprisoned by virtue of proceedings which are regular in form but not justified by the real facts, the remedy is malicious persecution and not false imprisonment.⁶ One who merely states the facts to a magistrate and signs and swears to a complaint embodying such facts, is not liable for false imprisonment, though the complaint is insufficient and the magistrate has no jurisdiction.⁷ So where one merely gives information to an officer which leads to the plaintiff's arrest;⁸ or erroneously identifies the plaintiff as the person wanted.^{8a} But in either of the foregoing cases if the party requests the service of the warrant or aids or participates in the arrest he is liable.⁹ If an officer, after having made a lawful arrest, abuses his authority, he becomes a trespasser *ab initio* and liable for false imprisonment.¹⁰ Where one

5—Ordronaux, *Judicial Aspects of Insanity*, p. xxxviii, *Introd.*

6—*Shipman v. Fletcher*, 9 Mackey, 245; *Schultz v. Huebner*, 108 Mich. 274, 66 N. W. 57; *Finley v. St. Louis Refrigerator, etc., Co.*, 99 Mo. 559, 13 S. W. 87; *Bierwith v. Peronnet*, 65 Mo. App. 431; *Dougherty v. Snyder*, 97 Mo. App. 495, 71 S. W. 463; *Swart v. Rickard*, 148 N. Y. 264, 42 N. E. 665; *Gilbert v. Satterlee*, 43 Misc. 292, 88 N. Y. S. 871; *Foster v. Orr*, 17 Ore. 447, 21 Pac. 440; *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. 76; *Marks v. Sullivan*, 9 Utah, 12, 33 Pac. 224; *King v. Johnston*, 81 Wis. 578, 51 N. W. 1011.

7—*Wilmerton v. Sample*, 42 Ill. App. 254; *Langford v. Boston, etc.,*

Co., 144 Mass. 431; *Doty v. Hurd*, 124 Mich. 671, 83 N. W. 632; *Gifford v. Wiggins*, 50 Minn. 401, 52 N. W. 904; *Booth v. Kurrus*, 55 N. J. L. 370, 26 Atl. 1013; *Whitney v. Hause*, 36 App. Div. 420, 55 N. Y. S. 375; *McElhattan v. Kane*, 7 Pa. Co. Ct. 313; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084. See *Coffin v. Varila*, 8 Tex. Civ. App. 417, 27 S. W. 956.

8—*Benham v. Vernon*, 5 Mackey, 18; *Waters v. Anthony*, 20 App. D. C. 124.

8a—*Miller v. Fano*, 134 Cal. 103, 66 Pac. 183.

9—*Hewitt v. Newburger*, 141 N. Y. 538, 36 N. E. 593, 38 Am. St. Rep. 807.

10—*Harness v. Steele*, 159 Ind.

was arrested on suspicion of felony, but without sufficient grounds to justify it, and, after being detained two days, was fined for carrying concealed weapons, it was held that the conviction did not cure the original wrong.¹¹ "It would not do," says the court, "to hold that the illegality of a person's arrest upon an unfounded charge would be cured by the subsequent charge and conviction for another offense."

Those who procure one's arrest for the violation of an ordinance will not be liable for false imprisonment because the ordinance afterwards turns out to be invalid.¹² "A party in good faith making a complaint for the violation of any law or ordinance is not required to take the risk of being mulcted in damages if courts afterwards hold it unconstitutional. This rule is dictated by the plain principles of public policy."¹³

In making or procuring the arrest of a person both officers and private persons act at their peril in the matter of identity.

286, 64 N. E. 875; *Stewart v. Feeley*, 118 Ia. 524, 92 N. W. 670; *Robbins v. Swift*, 86 Me. 197, 29 Atl. 981; *Twilley v. Perkins*, 77 Md. 252, 26 Atl. 286, 39 Am. St. Rep. 408, 19 L. R. A. 632; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Martin v. Golden*, 180 Mass. 549, 62 N. E. 977; *Anderson v. Beck*, 64 Miss. 113; *Pastor v. Regan*, 9 Misc. 547, 30 N. Y. S. 657; *Leger v. Warren*, 62 Ohio St. 500, 57 N. E. 506, 78 Am. St. Rep. 738, 51 L. R. A. 193; *Newby v. Gunn*, 74 Tex. 455, 12 S. W. 67. But see *Mulberry v. Fuelhart*, 203 Pa. St. 573, 53 Atl. 504.

11—*Snead v. Bonnoil*, 166 N. Y. 325, 59 N. E. 899. And see *Francis v. Telyon*, 26 App. Div. 340, 49 N. Y. S. 799.

12—*James v. Sweet*, 125 Mich. 132, 84 N. W. 61; *Wheeler v. Gavin*, 5 Ohio C. C. 246; *Goodwin v. Guild*, 94 Tenn. 486, 29 S. W. 721, 45 Am. St. Rep. 743, 27 L. R. A. 660; *Gifford v. Wiggins*, 50 Minn.

401, 52 N. W. 904. In the last case the court says: "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case if he has acted maliciously. This rule has been frequently applied where the facts stated in the complaint did not constitute a public offense, and it can make no difference in principle whether this is because the facts stated do not bring the case within a valid statute, or because the statute under which the proceedings are instituted is invalid." p. 404.

13—*Brooks v. Mangan*, 86 Mich.

If the wrong party is arrested they are liable for false imprisonment and good faith is no defense.¹⁴ But where a sheriff, acting upon a description and photograph, arrested the plaintiff by mistake, as the person wanted in a distant city on a warrant for felony, it was held by the Supreme Court of Michigan that if the officer in such cases acts honestly and prudently, and makes such inquiry and investigation, as a reasonably prudent man would and the circumstances permit, he will not be liable.¹⁵ Where an officer makes an arrest by virtue of a warrant void on its face, he cannot justify by showing facts that justified the arrest without a warrant.¹⁶ So where a private person directs or requests an officer to arrest the plaintiff on a criminal charge, he cannot justify by showing that the officer had good ground for making the arrest on his own motion, when the officer did not act on his own initiative.¹⁷ One officer cannot justify an arrest on the ground that there was a valid warrant for such arrest in the hands of another officer.¹⁸ Where the complaining witness signed the warrant instead of the affidavit, and the magistrate signed the jurat only and issued the warrant in this condition to a constable who arrested the plaintiff thereon, it was held that the complainant had contributed to the wrong by his negligence and was liable.¹⁹

576, 24 Am. St. Rep. 137; *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215.

14—*Wells v. Johnston*, 52 La. Ann. 713, 27 So. 185; *Grinnell v. Weston*, 95 App. Div. 454, 88 N. Y. S. 781; *Clark v. Winn*, 19 Tex. Civ. App. 223, 46 S. W. 915. "It is well settled that ministerial officers or sheriffs and constables act at their peril in serving judicial process, and that they cannot justify an abuse of process by showing that they acted in good faith, excepting in mitigation of damages." *Holmes v. Blyler*, 80 Ia. 365, 367, 45 N. W. 756. The arrest of the plaintiff may be justi-

fied under a warrant describing him by a fictitious name. *Tidball v. Williams*, 2 Ari. 50, 8 Pac. 351.

15—*Filer v. Smith*, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

16—*Elwell v. Reynolds*, 6 Kan. App. 545, 51 Pac. 578.

17—*Rich v. McInerney*, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32.

18—*McCullough v. Greenfield*, 133 Mich. 463, 95 N. W. 532; *Webb v. State*, 51 N. J. L. 189, 17 Atl. 113.

19—*Oates v. Bullock*, 136 Ala. 537, 33 So. 835, 96 Am. St. Rep. 38.

It has been held in Massachusetts that though a warrant is regular on its face and is issued by a court of general jurisdiction, yet if the officer receiving the warrant knows of the existence of facts by virtue of which the court has no jurisdiction in the case, he will be liable for false imprisonment, if he makes an arrest under the warrant. The facts of the case were as follows: The plaintiff was a Norwegian subject and master of a Norwegian vessel then in the port of Boston. The suit in question was brought by a seaman against the plaintiff, as master of the vessel, and the warrant was issued in this suit and placed in the hands of the defendant as constable. By reason of a treaty the court had no jurisdiction in such a case. The defendant was informed of all the facts before serving the writ but nevertheless went on and arrested the plaintiff. In a suit by the plaintiff for false imprisonment the constable was held liable. The court states the law to be that, "An officer is bound to know the law, and to know the jurisdiction of the court whose officer he is; if, therefore, he does an act in obedience to a precept of the court, and the court has no jurisdiction in the matter, either because the statute under which the court acted is unconstitutional, or there is a want of jurisdiction for any other reason, it would seem that the officer is not protected."

Also that "if facts are brought to the attention of the officer about which he can have no reasonable doubt, and he knows, or is bound to know, that on these facts the court has no jurisdiction of the controversy, he may well be held to proceed at his peril."²⁰

20—*Tellefsen v. Fee*, 168 Mass. 188, 194, 195, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481. The following are to the same effect: *Sprague v. Birchard*, 1 Wis. 457, 60 Am. Dec. 393; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Leachman v. Dougherty*, 81 Ill. 324. KNOWLTON, J., dissenting in the Mass. case, says: "An officer is bound to know the law, even to the extent of determining whether a statute upon which his process is founded is or is not constitutional. But for the facts, he is not called upon to take the testimony of anybody in regard to anything outside the statements contained in the process, nor even act upon what he believes to be his own knowledge. The jurisdiction which the court must have in order to justify him is jurisdiction of the case stated

The superintendent of a poor farm has no right to imprison or confine a pauper because of his refusal to work, in the absence of any rules of the county board authorizing such punishment.²¹ A statute authorized the sheriff to call upon citizens to aid in the arrest of a person for felony or breach of the peace and imposed a penalty for refusal to comply. It was held that one who obeyed and who aided in the arrest of a person and only did what he was directed to do by the officer was not liable for false imprisonment, though the arrest was unlawful.²² "We do not think," says the court, "that a man called upon by the sheriff is required, at his peril, to ascertain whether the sheriff has a proper warrant, or whether the offense charged against the person to be arrested is a felony, or that he may refuse to act until he is satisfied that the sheriff is acting legally, or within the scope of his office, in a criminal case. If he were allowed to do this, the object of the law would be defeated, and the statute rendered nugatory in many cases."

in the writ. It may turn out that there was no real case upon which to issue a writ, and that the prosecution is grossly malicious, or that there is a real case materially different from that stated, and which does not come within the jurisdiction of the court, but the officer is not bound to inquire into matters of this kind. This has been held in a great many cases in Massachusetts and elsewhere, and the reasons for the rule have been elaborately stated in different jurisdictions. These reasons seem to me fully to cover the present case." Citing *Twitchell v. Shaw*, 10 Cush. 46; *Wilmarth v. Burt*, 7 Met. 257; *Donahoe v. Shed*, 8 Met. 326; *Fisher v. McGirr*, 1 Gray 1, 45; *Clarke v. Gay*, 2 Gray, 410; *Chase v. Ingalls*, 97 Mass. 524; *Underwood v. Robinson*, 106 Mass. 296, 297; *Rawson v. Spencer*, 113 Mass. 40, 46; *Cassier v. Fales*, 139

Mass. 461; *State v. Weed*, 21 N. H. 262; *Batchelder v. Currier*, 45 N. H. 460; *Watson v. Watson*, 9 Conn. 140; *Warren v. Kelley*, 80 Me. 512, 531; *Earl v. Camp*, 16 Wend. 562; *Webber v. Gay*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440; *Haun v. Lloyd*, 21 Vroom, 1; *Taylor v. Alexander*, 6 Ohio, 144, 147; *Henline v. Reese*, 54 Ohio St. 599; *Wall v. Trumbull*, 16 Mich. 228, 234. The point is discussed in a note in 22 Am. Dec., pp. 201-204. If an officer arrests without a warrant and on the direction of another a person whom he believes to be innocent and who is so in fact, the officer will be liable. *Yoant v. Carney*, 91 Ia. 559, 60 N. W. 114.

21—*Sawyer v. Aldag*, 45 Ill. App. 77.

22—*Firestone v. Rice*, 71 Mich. 377, 37 N. W. 303, 15 Am. St. Rep. 266.

All who aid, assist, direct, advise or encourage the unlawful arrest of a person are liable for the consequences,²³ and corporations will be liable for a false imprisonment made or procured by their agents or servants, if, within the scope of their employment, or, if authorized or ratified by them.²⁴ Where the person arrested pleads guilty and submits to a fine in order to avoid being locked up, or his discharge is the result of a compromise, or is on request and the promise of good behavior, a recovery for false imprisonment is barred.²⁵ But the giving of bail²⁶ or a judgment remanding the prisoner on habeas corpus²⁷ does not have that effect.

MALICIOUS PROSECUTION.

The Nature of the Wrong. It is the lawful right of every man, who believes he has a just demand against another, to institute a suit and endeavor to obtain the proper redress. If his belief proves to be unfounded, his groundless proceedings may possibly cause a very serious injury to the defendant; the mere assertion of a serious claim at law being capable, in some circumstances, of affecting materially one's standing and credit. But to treat that as a legal wrong which consists merely in asserting a claim which cannot satisfactorily be established, would be plainly impolitic and unjust. The failure to sustain it might

- 23—*Pearce v. Needham*, 37 Ill. App. 90; *Bright v. Patton*, 5 Mackey (D. C.), 534, 60 Am. Rep. 396; *Allison v. Hobbs*, 96 Me. 26, 51 Atl. 245; *Cameron v. Pacific Express Co.*, 48 Mo. App. 99; *Johnson v. Bouton*, 35 Neb. 898, 53 N. W. 995; *Burk v. Howley*, 179 Pa. St. 539, 36 Atl. 327, 57 Am. St. Rep. 607; *Tenny v. Harvey*, 63 Vt. 520, 22 Atl. 659.
- 24—*Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1, 71 S. W. 1055; *Lovick v. Atlantic Coast Line R. Co.*, 129 N. C. 427, 40 S. E. 191; *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 28 Atl. 182, 39 Am. St. Rep. 248; *Eichengreen v. Railroad Co.*, 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702; *Cunningham v. Seattle Elec. Ry. & P. Co.*, 3 Wash. 471, 28 Pac. 745.
- 25—*Fadner v. Filer*, 27 Ill. App. 506; *Joyce v. Parkhurst*, 150 Mass. 243, 22 N. E. 899; *Jones v. Foster*, 43 App. Div. 33, 59 N. Y. S. 738.
- 26—*Buzzell v. Emerton*, 161 Mass. 176, 36 N. E. 796.
- 27—*Bradley v. Beeth*, 153 Mass. 154, 26 N. E. 429.

possibly have come from the death of a witness or other [*208] loss of *testimony, from false evidence, from a mistake of law in the judge, from misconduct in the jury, from any cause rather than fault in the plaintiff himself. To compel him, as the penalty for instituting a suit he cannot sustain, to pay the costs of a defense is generally all that is just, and is sufficient to make persons cautious about instituting suits which they have reason to believe are baseless.²⁸

It is equally the lawful right of every man to institute or set on foot criminal proceedings wherever he believes a public offense has been committed. Here the injury is likely to be more serious if the proceeding is unwarranted, but here, also, it would be both unjust and impolitic to make the prosecution which fails an actionable wrong. In some cases complainants are required to become responsible for costs, but this is usually the only liability.

Nevertheless it is a duty which every man owes to every other not to institute proceedings maliciously, which he has no good reason to believe are justified by the facts and the law. Therefore, an action as for tort will lie when there is a concurrence of the following circumstances:

1. A suit or proceeding has been instituted without any probable cause therefor.²⁹

2. The motive in instituting it was malicious.

28—See *post*, pp. *217-220.

29—Procuring a search warrant is sufficient as institution of a proceeding. *Carey v. Sheets*, 67 Ind. 375. Filing an affidavit as beginning of bastardy proceedings. *Coffey v. Myers*, 84 Ind. 105. Taking out a peace warrant. *Hyde v. Greuch*, 62 Md. 577. But an arrest by an officer based upon an affidavit not made in any cause is not ground for an action. *Lewin v. Uzuber*, 65 Md. 341. It is not of itself a defense to the action that the complaint was defective and charged no offense. *Potter v.*

Gjertsen, 37 Minn. 386, 34 N. W. 746; *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542; *Stocking v. Howard*, 73 Mo. 25. If a magistrate erroneously supposes that facts set up in an affidavit constitute a crime and upon it issues process, the affiant is not liable. *Hahn v. Schmidt*, 64 Cal. 284; *Newman v. Davis*, 58 Ia. 447. If in embodying affiant's statement in a complaint the magistrate adds the word feloniously, the meaning of which affiant does not know, the latter is not liable. *Rogers v. Hassard*, 2 Ont. App. 507.

3. The prosecution has terminated in the acquittal or discharge of the accused.³⁰

Each of these circumstances requires separate attention. And what is said in this place will concern criminal proceedings only.

***Probable Cause.** The first of these is the existence [*209] of probable cause. This involves a consideration of what the facts are, and what are the reasonable deductions from the facts. It is, therefore, what is denominated a mixed question of law and fact.³¹ If the facts are not in dispute the question is for the court.³² Upon disputed facts the jury must be left

- 30—See as supporting the general statement: *Lunsford v. Dietrich*, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37; *Killebraw v. Carlisle*, 97 Ala. 535, 12 So. 167; *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905; *National Surety Co. v. Mabrey*, 139 Ala. 217, 35 So. 698; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 312, 59 Pac. 698; *Porter v. White*, 5 Mackey, 180; *Schattgen v. Holnback*, 52 Ill. App. 54; *Paddock v. Watts*, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832; *Davis v. Seeley*, 91 Ia. 583, 60 N. W. 183; *Noble v. White*, 103 Ia. 352, 72 N. W. 556; *Cointement v. Cropper*, 41 La. Ann. 303, 6 So. 127; *Dreyfus v. Aul*, 29 Neb. 191, 45 N. W. 282; *Kline v. Hibbard*, 80 Hun, 50, 29 N. Y. S. 807; *Stamper v. Raymond*, 38 Ore. 17, 62 Pac. 20; *Madison v. Pennsylvania R. R. Co.*, 147 Pa. St. 509, 23 Atl. 764, 30 Am. St. Rep. 756; *Stoddard v. Roland*, 31 S. C. 342, 9 S. E. 1027; *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101; *Staunton v. Goshorn*, 94 Fed. 52, 36 C. C. A. 75.
- 31—*Porter v. White*, 5 Mackey, 180; *Lewton v. Hower*, 35 Fla. 58, 16 So. 616; *Schattgen v. Holnback*, 149 Ill. 646, 36 N. E. 969; *Cooper v. Fleming*, 114 Tenn. 40.
- 32—*Busst v. Gibbons*, 6 H. & N. 912; *Boyd v. Cross*, 35 Md. 194; *McWilliams v. Hoban*, 42 Md. 56; *Speck v. Judson*, 63 Me. 207; *Cooper v. Waldron*, 50 Me. 80; *Sweet v. Negus*, 30 Mich. 406; *Chapman v. Cawrey*, 50 Ill. 512; *Thompson v. Force*, 65 Ill. 370; *Swaim v. Stafford*, 4 Ired. 392; *Harkrader v. Moore*, 44 Cal. 144; *Pangburn v. Bull*, 1 Wend. 345; *Masten v. Deyo*, 2 Wend. 424; *Ulmer v. Leland*, 1 Me. 135, 10 Am. Dec. 48; *Crescent City, etc., Co. v. Butchers, etc., Co.*, 120 U. S. 141; *McNulty v. Walker*, 64 Miss. 198; *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542; *Sartwell v. Parker*, 141 Mass. 405; *Seabridge v. McAdams*, 108 Cal. 345, 41 Pac. 409; *McDonald v. Atlantic, etc., R. R. Co.*, 3 Ari. 96, 21 Pac. 338; *Spitzer v. Friedlander*, 14 App. D. C. 556; *Meyer v. Louisville, etc., Ry. Co.*, 98 Ky. 365, 33 S. W. 98; *Lancaster v. McKay*, 103 Ky. 616, 45 S. W. 887; *Huntington v. Gault*, 81 Mich. 144, 45 N. W. 970; *Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194; *Far-*

to pass,³³ but the court must determine on the facts found whether or not probable cause existed. As to what facts are sufficient to show probable cause is a question of law for the court and whether such facts are proved by the evidence is a question for the jury.³⁴ "The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that if they find such facts to be established, there was or was not probable cause, and that their verdict must be accordingly."³⁵ It is not competent for the court to give

rell v. Freedlander, 63 Hun, 254, 18 N. Y. S. 215; Staunton v. Goshorn, 94 Fed. 52, 36 C. C. A. 75.

33—"It is generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause or that they do not." STRONG, J., Stewart v. Sonneborn, 98 U. S. 187; Hicks v. Faulkner, L. R. 8 Q. B. D. 167; Humphries v. Parker, 52 Me. 502; Driggs v. Burton, 44 Vt. 124; Heyne v. Blair, 62 N. Y. 19; Thaule v. Krekeler, 81 N. Y. 428; Cole v. Curtis, 16 Minn. 182; Burton v. St. Paul, etc., Co., 33 Minn. 189; Eastin v. Bank, 66 Cal. 123, 56 Am. Rep. 77; Fulton v. Onesti, 66 Cal. 575; Emerson v. Skaggs, 52 Cal. 246; Meysenberg v. Engelke, 18 Mo. App. 346; Johnson v. Miller, 63 Ia. 529; Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135; Angelo v. Faul, 85 Ill. 106; Travis v. Smith, 1 Pa. St. 234; Walbridge v. Pruden, 102 Pa. St. 1; Hamilton v. Smith, 39 Mich. 222; Johns v. Marsh, 52 Md. 323; Thelin v. Dorsey, 59 Md. 539; Vinal v. Core, 18 W. Va. 1; Ramsey v. Arrott, 64 Tex. 320. But in South Carolina the question of

probable cause is held to be for the jury under suitable instructions. Caldwell v. Bennett, 22 S. C. 1.

34—Lacey v. Porter, 103 Cal. 597, 37 Pac. 635; Sandell v. Sherman, 107 Cal. 391, 40 Pac. 493; Cleveland, etc., Ry. Co. v. Jenkins, 75 Ill. App. 17; Donnelly v. Burkett, 75 Ia. 613, 34 N. W. 330; Ahrens, etc., Mfg. Co. v. Hoeher, 106 Ky. 692, 51 S. W. 194; Metropolitan Life Ins. Co. v. Miller, 114 Ky. 754; 71 S. W. 921; Campbell v. Baltimore, etc., R. R. Co., 97 Md. 341, 55 Atl. 532; Moore v. Northern Pac. R. R. Co., 37 Minn. 147, 33 N. W. 334; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Shafer v. Hertzog, 92 Minn. 171, 99 N. W. 796; Bank of Miller v. Richman, 64 Neb. 111, 89 N. W. 627; Hess v. Ore. Baking Co., 31 Ore. 503, 49 Pac. 803; Stamper v. Raymond, 38 Ore. 17, 62 Pac. 20; Mahaffy v. Byers, 151 Pa. St. 92, 25 Atl. 93; Huckestein v. New York Life Ins. Co., 205 Pa. St. 27, 54 Atl. 461.

35—Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174. To same effect: Porter v. White, 5 Mackey, 180; Lewton v. Hower, 35 Fla. 58, 16 So. 616; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. 969; Low v. Greenwood, 30 Ill.

to the jury a definition of probable cause, and instruct them to find for or against the defendant according as they may determine that the facts are within or without the definition.³⁶ Many judges have attempted to define what shall constitute probable cause. Says Chief Justice TINDALL: "There must be a reasonable cause, such as would operate on the mind of a discreet man; there must be a probable cause, such as would operate on the mind of a reasonable man."³⁷ Another eminent judge has said, "There must be such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the person is guilty."³⁸ Says* another: "Anything which will create in the [*210] mind of a reasonable man the belief that a felony existed, and that the party charged was in any way concerned in it, is probable cause."³⁹ And another: "Probable cause is generally

App. 184; *Cottrell v. Cottrell*, 126 Ind. 181, 25 N. E. 905; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; *Rankin v. Crane*, 104 Mich. 6, 61 N. W. 1007; *Dreyfus v. Aul*, 29 Neb. 191, 45 N. W. 282; *Boush v. Fidelity & Dep. Co.*, 100 Va., 735, 42 S. E. 877. An instruction that if the defendant honestly believed the plaintiff guilty and that that belief was founded on a knowledge of facts and circumstances tending to show guilt which were sufficient to induce an ordinarily prudent man to so believe, then there was probable cause, was held correct, though it did not enumerate the facts. *Donnelly v. Burkett*, 75 Ia. 613, 34 N. W. 330.

36—*Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174.

37—*Broad v. Ham*, 5 Bing. (N. C.) 722.

38—SHAW, Ch. J., in *Bacon v. Towne*, 4 Cush. 217, 238. "If every man who suffers by the perpetration of a crime were bound, under penalty of heavy damages, to

ascertain before he commences a prosecution that he has such evidence as will insure a conviction, few prosecutions would be set on foot, the guilty would escape while conclusive evidence was sought for; offenses of every grade would, for the most part, go unpunished, and the penal law would be scarcely more than a dead letter. The law, therefore, protects the prosecutor if he have reasonable or probable ground for the prosecution, that is, if he have such ground as would induce a man of ordinary prudence and discretion to believe in the guilt and to expect the conviction of the person suspected, and if he acts in good faith on such belief and expectation." *Faris v. Starke*, 3 B. Mon. 4, 6, per MARSHALL, Ch. J. The belief may be based upon purely circumstantial evidence. *Raulston v. Jackson*, 1 Sneed, 128.

39—O'NEILL, Ch. J., in *Braveboy v. Cockfield*, 2 McM. 270, 274.

defined to be a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily *prudent* man in believing the party is guilty of the offence."⁴⁰

It was held error to substitute the word *cautious* for *prudent* in the last definition.⁴¹ A mere belief, therefore, that cause exists is not sufficient, for one may believe on suspicion and suspect without cause, or his belief may proceed from some mental peculiarity of his own; there must be such grounds of belief as would influence the mind of a reasonable person, and nothing short of this could justify a serious and formal charge against another.⁴² Still, some allowance must be made for the excitement under which prosecutions for supposed offenses against the complainant himself are almost necessarily instituted. [*211] The complainant cannot be required *to act with the same impartiality and absence of prejudice in drawing

40—*McClafferty v. Philip*, 151 Pa. St. 86, 90, 24 Atl. 1042. *v. Langenberg*, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322;

41—Ibid. Further definitions and statements of the doctrine will be found in the following cases: *Hitson v. Sims*, 69 Ark. 439, 64 S. W. 219; *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; *Clement v. Major*, 1 Colo. App. 297, 29 Pac. 19; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 16 Atl. 554; *Coleman v. Allen*, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; *Neufeld v. Rode-
minski*, 144 Ill. 83, 32 N. E. 913; *Gardiner v. Mays*, 24 Ill. App. 286; *Tumalty v. Parker*, 100 Ill. App. 382; *Lawrence v. Leathers*, 31 Ind. App. 414, 68 N. E. 179; *Ahrens, etc., Mfg. Co. v. Hoehner*, 106 Ky. 692, 51 S. W. 194; *Womack v. Fudikar*, 47 La. Ann. 33, 16 So. 645; *Mosley v. Yearwood*, 48 La. Ann. 334, 19 So. 274; *Sandoz v. Veazie*, 106 La. Ann. 202, 30 So. 767; *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81; *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19; *Boeger
Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122; *Rider v. Murphy*, 47 Neb. 857, 66 N. W. 337; *Mitchell v. Logan*, 172 Pa. St. 349, 33 Atl. 554; *Markley v. Snow*, 207 Pa. St. 447, 56 Atl. 990, 64 L. R. A. 685; *Fox v. Smith*, 25 R. I. 255, 55 Atl. 698; *Graham v. Life Ass.*, 98 Tenn. 48, 37 S. W. 995; *Mussman v. Ihlenfeldt*, 89 Wis. 585, 62 N. W. 522.

42—*Mowry v. Whipple*, 8 R. I. 360; *Farnam v. Feeley*, 56 N. Y. 451; *Winebiddle v. Portefield*, 9 Pa. St. 137, 139; *Collins v. Hayte*, 50 Ill. 353, 99 Am. Dec. 521; *Hall v. Suydam*, 6 Barb. 83, 89. In *Fagnam v. Knox*, 66 N. Y. 525, 526, CHURCH, Ch. J., says: "The question of what constitutes probable cause does not depend upon whether the offense has been committed in fact, nor whether the accused is guilty or innocent, but upon the prosecutor's belief, based upon reasonable grounds. Bacon

his conclusions as to the guilt of the accused that a person entirely disinterested would deliberately do, any more than a person assaulted could be expected to judge of his danger with the like coolness and impartiality.⁴³ And all that can be required of him is that he shall act as a reasonable and prudent man would be likely to act under like circumstances.⁴⁴ The rule and the reason for the rule are thus stated by the Supreme Court of California: "Actions for malicious prosecution have never been favored in the law, although they have always been readily

v. Towne, 4 Cush. 217. The prosecutor may act upon appearances; if the apparent facts are such that a discreet and prudent person would be led to the belief that the accused had committed a crime, he will not be liable in this action, although it may turn out that the accused was innocent. *Carl v. Ayres*, 53 N. Y. 14. If there is an honest belief of guilt, and there exist reasonable grounds for such belief, the party will be justified. But however suspicious the appearances may be from existing circumstances, if the prosecutor has knowledge of facts which will explain the suspicious appearances and exonerate the accused from a criminal charge, he cannot justify a prosecution by putting forth the *prima facie* circumstances and excluding those within his knowledge which tend to prove innocence." Such a case must be presented to the mind as would induce a sober, sensible and discreet person to act upon it. *Barron v. Mason*, 31 Vt. 189. See *Spengler v. Davy*, 15 Grat. 381; *Bauer v. Clay*, 8 Kan. 580; *Boyd v. Cross*, 35 Md. 194; *Travis v. Smith*, 1 Pa. St. 234; *Shaul v. Brown*, 28 Iowa, 37, 4 Am. Rep. 151; *Gallaway v. Burr*, 32 Mich. 332; *Gee v. Patterson*, 63 Me. 49. There

should be such a state of facts and circumstances as would induce men of ordinary prudence and conscience to believe the charge to be true. *Driggs v. Burton*, 44 Vt. 124. See, further, *Stone v. Stevens*, 12 Conn. 219, 30 Am. Dec. 611; *Jacks v. Stimpson*, 13 Ill. 791; *Lawrence v. Lanning*, 4 Ind. 194; *Bank of British N. A. v. Strong*, 1 App. Cas., Priv. Coun. 307; *S. C. 16 Moak*, 24; *Hicks v. Faulkner*, L. R. 8 Q. B. D. 167; *Johns v. Marsh*, 52 Md. 323; *Johnson v. Miller*, 69 Ia. 562; *Jordan v. Ala.*, etc., R. R. Co., 81 Ala. 220; *Forbes v. Hagman*, 75 Va. 168; *Casey v. Sevaton*, 30 Minn. 516; *Spalding v. Lowe*, 56 Mich. 366; *Chapman v. Dunn*, Id. 31; *King v. Colvin*, 11 R. I. 582; *Planter's Ins. Co. v. Williams*, 60 Miss. 916; *Kruevitz v. Eastern R. R.*, 140 Mass. 573; *Vansickle v. Brown*, 68 Mo. 627; *Dwain v. Discalso*, 66 Cal. 415; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. Rep. 505.

43—*Cole v. Curtis*, 16 Minn. 182. *Carter v. Sutherland*, 52 Mich. 597.

44—*Bourne v. Stout*, 62 Ill. 261, *Neufeld v. Rodeminski*, 144 Ill. 83, 32 N. E. 913; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 16 Atl. 554; *Terre Haute*, etc., R. R. Co. *v. Mason*, 148 Ind. 578, 46 N. E. 332.

upheld when the proper elements therefor have been presented. They are sustained, however, only when it is shown that the prosecution was in fact actuated by malice, and that the party instigating it had no reasonable ground for causing the prosecution. It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule, that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime, and when the acts of the citizen in making such exposure are challenged as not within the reason of the rule, the court, as in every other case involving considerations of public policy, must itself determine the question as a matter of law, and not leave it to the arbitrament of a jury.''⁴⁵

The test of probable cause is to be applied as of the time when the action complained of was taken; and if upon the facts then known the party had no probable cause for action, it will be no protection to him that facts came to his knowledge afterwards that might have constituted a justification had he been aware of them.⁴⁶ But some cases hold that the plaintiff's guilt of the crime charged may be shown and will be a complete defense in every case, though the facts known to the defendant at the time of the arrest were insufficient to show even probable guilt or probable cause.⁴⁷ Says the court in one of the cases referred to:

45—*Ball v. Rawles*, 93 Cal. 222, 164; *Josselyn v. McAllister*, 25 228, 229, 28 Pac. 937, 27 Am. St. Mich. 45; *Foshay v. Ferguson*, 2 Rep. 174. Denio, 617; *Thompson v. Beacon*

46—*Delegal v. Highley*, 3 Bing. Valley Rubber Co., 56 Conn. 493, (N. C.) 950; *Bell v. Percy*, 5 Ired. 16 Atl. 554; *Smith v. King*, 62 83; *Johnson v. Chambers*, 10 Ired. Conn. 515, 26 Atl. 1059. See *Sims v. McLendan*, 3 Strob. 557. (N. C.) L. 287; *Galloway v. Stewart*, 49 Ind. 156; S. C. 19 Am. Rep.

47—*Threefoot v. Nuckols*, 68 677; *Skidmore v. Bricker*, 77 Ill. Miss. 116, 8 So. 335; *Thurber v.*

"Surely no reason can be assigned, nor any respectable authority produced to justify the shocking proposition that the guilt of the plaintiff in a suit for malicious prosecution may not be shown in any manner or by any proofs, no matter where or when or how acquired. Reason and conscience revolt at the bare thought of a proven criminal recovering damages against the prosecutor, even though the prosecutor's motives were bad, and his knowledge of the facts establishing the guilt of the accused was defective. The want of probable cause *and* malice must conjoin to warrant a recovery in cases of this character, and no man is to be punished by an adverse judgment in a suit for malicious prosecution, because when he began the criminal prosecution he had not in his possession facts sufficient to create probable cause. There must not only be a want of knowledge of such facts, but there must be a malicious intent conjoined thereto, and the guilt of the accused must in every case be a perfect defense."⁴⁸

Probable cause is not made out if the defendant knew facts sufficient on their face to make the guilt of the plaintiff reasonably probable but did not believe the facts or believe the plaintiff guilty. It is essential that the prosecutor believe in the guilt of the accused.⁴⁹ "Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a prudent man in believing the accused guilty. It is not determined by the existence of facts alone, but by the prosecutor's belief in them, and the reasonableness of his belief. If he knows that statements tending to implicate the accused are untrue, or if they are impeached by other facts within his knowledge, or are discredited because of the source from which they come, they furnish no ground of defense, because as

Eastern B. & L. Ass., 118 N. C. 129, 24 S. E. 730.

48—Threefoot v. Nuckols, 68 Miss. 116, 123, 8 So. 335.

49—Dunlap v. New Zealand, etc., Ins. Co., 109 Cal. 365, 42 Pac. 29; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. 969; Harris v. Woodford, 98 Mich. 147, 57 N. W. 96;

Jackson v. Bell, 5 S. D. 257, 58 N. W. 671; Acton v. Coffman, 74 Ia. 17, 36 N. W. 774; Johnson v. Miller, 82 Ia. 693, 48 N. W. 925, 31 Am. St. Rep. 514; Burbanks v. Leporsky, 134 Mich. 384, 96 N. W. 456. See cases cited in note 46; also Bigelow, Lead. Cas. on Torts, 198, 200. Although suspicious cir-

to the prosecutor they are not a ground of belief."⁵⁰ Whether the defendant is entitled to rely upon information received is a question of fact for the jury.⁵¹

It is held that the defendant should exercise reasonable care or due diligence to ascertain the facts and that he is chargeable with a knowledge of all facts which such care or diligence would have disclosed.⁵² But it would seem that if the facts known to the defendant show probable cause, he need not make further inquiries, unless there is something in the nature of those facts or of the surrounding circumstances that would put a reasonable man on inquiry.⁵³

Advice of Counsel. It may perhaps turn out that the complainant, instead of relying upon his own judgment, has taken the advice of counsel learned in the law and acted upon that.

This should be safer and more reliable than his own [*212] judgment, *not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearings. A prudent man is therefore expected to take such advice; and when he does so and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause,⁵⁴ provided the disclosure appears to have been

cumstances may seem to afford probable cause the prosecutor is liable if he knows the accused is innocent, or does not believe him guilty. *Woodworth v. Mills*, 61 Wis. 44, 50 Am. Rep. 135; *Plummer v. Johnson*, 70 Wis. 131, 35 N. W. 334.

50—*Markley v. Snow*, 207 Pa. St. 447, 56 Atl. 990, 64 L. R. A. 685.

51—*Owens v. New Rochelle, etc., Co.*, 38 App. Div. 53, 55 N. Y. S. 913.

52—*Flam v. Lee*, 116 Ia. 289, 90 N. W. 70, 93 Am. St. Rep. 242; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650.

53—*Kansas, etc., Coal Co. v.*

Galloway, 71 Ark. 351, 74 Pac. 521, 100 Am. St. Rep. 79; *Dunlap v. New Zealand, etc., Ins. Co.*, 109 Cal. 365, 42 Pac. 29; *Boyd v. Mendenhall*, 53 Minn. 274, 55 N. W. 45.

54—*Ravenga v. Mackintosh*, 2 B. & C. 693; *Stone v. Swift*, 4 Pick. 389, 16 Am. Dec. 349; *Walter v. Sample*, 25 Pa. St. 275; *Hall v. Suydam*, 6 Barb. 83; *Olmstead v. Partridge*, 16 Gray, 381; *Ames v. Snider*, 69 Ill. 376; *Wicker v. Hotchkiss*, 62 Ill. 107, 14 Am. Rep. 75; *Burgett v. Burgett*, 43 Ind. 78; *Stewart v. Sonneborn*, 98 U. S. 187; *St. Johnsbury, etc., Co. v. Hunt*, 59 Vt. 294; *Sharpe v. John-*

full and fair, and not to have withheld any of the material facts.⁵⁵ But the advice must be that of a person accepted and licensed by the courts as one learned in the law and competent to be adviser to clients and to the court; and if one chooses to accept and rely upon the opinion and advice of a justice of the

- ston, 76 Mo. 660; *Jones v. Jones*, 71 Cal. 89; *Allen v. Codman*, 139 Mass. 136; *Jordan v. Ala.*, etc., R. R. Co., 81 Ala. 220; *Marks v. Hastings*, 101 Ala. 165, 13 So. 297; *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905; *Smith v. Liverpool*, etc., Ins. Co., 107 Cal. 432, 40 Pac. 540; *Dunlap v. New Zealand*, etc., Ins. Co., 109 Cal. 365, 42 Pac. 29; *Porter v. White*, 5 Mackey, 180; *Hicks v. Brantley*, 102 Ga. 264, 29 S. E. 459; *Neufeld v. Rodeminski*, 144 Ill. 83, 32 N. E. 913; *Chicago Forge & Belt Co. v. Rose*, 69 Ill. App. 123; *Morrow v. Carnes*, 108 Ill. App. 621; *Abel v. Downey*, 110 Ill. App. 343; *Womack v. Fudeckar*, 47 La. Ann. 33, 16 So. 645; *Huntington v. Gault*, 81 Mich. 144, 45 N. W. 970; *Perry v. Sulier*, 92 Mich. 72, 52 N. W. 801; *Poupard v. Dumas*, 105 Mich. 326, 63 N. W. 301; *Kampass v. Light*, 122 Mich. 86, 80 N. W. 1008; *Moore v. Northern Pac. R. R. Co.*, 37 Minn. 147, 33 N. W. 334; *Maynard v. Sigman*, 65 Neb. 590, 91 N. W. 576; *Hess v. Oregon Baking Co.*, 31 Ore. 503, 49 Pac. 803; *Beihofer v. Loeffert*, 159 Pa. St. 374, 28 Atl. 216; *Staunton v. Goshorn*, 94 Fed. 52, 36 C. C. A. 75; *Cooper v. Fleming*, 114 Tenn. 40; *Brinsley v. Schultz*, 124 Wis. 426, 102 N. W. 918. Some authorities hold that the advice of counsel is not conclusive of probable cause but is only a circumstance to be considered by the jury. *Smith v. Eastern B. & L. Ass.*, 116 N. C. 73, 20 S. E. 963; *Thurber v. Eastern B. & L. Ass.*, 116 N. C. 75, 21 S. E. 193; *Shannon v. Jones*, 76 Tex. 141, 13 S. W. 477.
- 55—*National Surety Co. v. Mabry*, 139 Ala. 217, 35 So. 698; *Seabridge v. McAdam*, 108 Cal. 345, 41 Pac. 409; *Brooks v. Bradford*, 4 Colo. App. 410, 36 Pac. 303; *Lewton v. Hower*, 35 Fla. 58, 16 So. 616; *Paddock v. Watts*, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832; *Flora v. Russell*, 138 Ind. 153, 37 N. E. 593; *Lawrence v. Leathers*, 31 Ind. App. 414, 68 N. E. 179; *Koster v. Seney*, 99 Ia. 584, 68 N. W. 824; *Connelly v. White*, 122 Ia. 391, 98 N. W. 144; *Lange v. Ill. Cent. R. R. Co.*, 107 La. Ann. 687, 31 So. 1003; *Torsch v. Dell*, 88 Md. 459, 41 Atl. 903; *Webster v. Fowler*, 89 Mich. 303, 50 N. W. 1074; *Jeremy v. St. Paul Boom Co.*, 84 Minn. 516, 88 N. W. 13; *Dreyfus v. Aul*, 29 Neb. 191, 45 N. W. 282; *Peterson v. Reisdorph*, 49 Neb. 529, 68 N. W. 943; *Jensen v. Halstead*, 61 Neb. 249, 85 N. W. 78; *Smith v. Walters*, 125 Pa. St. 453, 17 Atl. 466; *Barhight v. Tammany*, 158 Pa. St. 545, 28 Atl. 135, 38 Am. St. Rep. 853; *Replogle v. Frothingham*, 16 Pa. Supr. Ct. 374; *Jackson v. Bell*, 5 S. D. 257, 58 N. W. 671; *Palmer v. Broder*, 78 Wis. 483, 47 N. W. 744; *Ash v. Marlow*, 20 Ohio, 119; *Walter v. Sample*, 25 Pa. St. 275; *Kimmel v. Henry*, 64 Ill. 505; *Sharp v. Johnston*, 59 Mo. 557; *Cooper v. Utterbach*, 37 Md. 282; *Bliss v. Wyman*,

peace or other layman, he may do so in aid of his own [*213] judgment, but it cannot *afford him any protection.⁵⁶

But if the justice of the peace is also a practicing attorney and gives the advice in the latter capacity and acts in that capacity only in reference to the matter, his advice will have the same effect as that of any other attorney.⁵⁷ It is held to be otherwise if he also acts as magistrate in the particular case.⁵⁸ Though the defendant is a lawyer, he will be protected by the advice of counsel the same as a layman,⁵⁹ but he cannot shelter himself behind his own advice as his own counsel.⁶⁰ The advice of the prosecuting attorney stands on the same footing as the advice of a lay attorney.⁶¹

7 Cal. 257; *Anderson v. Friend*, 85 Ill. 135; *Mesher v. Iddings*, 72 Ia. 553, 34 N. W. 328; *Wild v. Odell*, 56 Cal. 136.

56—*Olmstead v. Partridge*, 16 Gray, 381; *Beel v. Robeson*, 8 Ired. 276; *Straus v. Young*, 36 Md. 246; *Burgett v. Burgett*, 43 Ind. 78; *Stanton v. Hart*, 27 Mich. 539; *Murphy v. Larson*, 77 Ill. 172; *Sutton v. McConnell*, 46 Wis. 269; *Brobst v. Ruff*, 100 Penn. St. 91, 45 Am. Rep. 358; *Gee v. Culver*, 12 Oreg. 228; *Colbert v. Hicks*, 5 Ont. App. 571; *McCullough v. Rice*, 59 Ind. 580; *Coleman v. Heurich*, 2 Mackey, 189; *Stewart v. Sonneborn*, 98 U. S. 187; *Florence Oil & R. Co. v. Huff*, 14 Colo. App. 281, 59 Pac. 624; *Rigden v. Jordan*, 81 Ga. 668, 7 S. E. 857; *Necker v. Bates*, 118 Ia. 545, 92 N. W. 667; *Finn v. Frink*, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348; *Brobst v. Ruff*, 100 Pa. St. 91, 45 Atl. 358; *Beihof v. Loeffert*, 159 Pa. St. 365, 28 Atl. 217; *Moulden v. Ball*, 104 Tenn. 597, 58 S. W. 248; *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101: "We think it would be injudicious to allow any extension

of the doctrine that legal advice under certain conditions may constitute probable cause or excuse the want of it." *Finn v. Frink*, 84 Me. 261, 266, 24 Atl. 851, 30 Am. St. Rep. 348. "Justices of the peace are not charged with the duty of giving advice. It is not their office or function. They have no right to act as attorney. They may determine for themselves whether the facts stated will justify them in issuing a warrant or commencing proceedings, but this they do judicially and for themselves, and not as advisers of parties seeking to commence actions." *Mauldin v. Ball*, 104 Tenn. 597, 601, 58 S. W. 248.

57—*Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; *Monaghan v. Cox*, 155 Mass. 487, 30 N. E. 467.

58—*Marks v. Hastings*, 101 Ala. 165, 13 So. 297.

59—*Terre Haute, etc., R. R. Co. v. Mason*, 148 Ind. 578, 46 N. E. 332.

60—*Epstein v. Berkowsky*, 64 Ill. App. 498.

61—*Kansas, etc., Coal Co. v.*

Some authorities hold that the advice of counsel goes to the question of malice, not of probable cause.⁶² All the authorities agree that the advice of counsel will be of no avail, unless sought and acted upon in good faith and with a genuine belief in the plaintiff's guilt.⁶³ Nor if the attorney selected is known to be

Galloway, 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79; St. Louis, etc., Ry. Co. v. Wallin, 71 Ark. 422, 75 S. W. 477; Hicks v. Brantley, 102 Ga. 264, 29 S. E. 459; Albrecht v. Ward, 91 Ill. App. 38; Schippel v. Norton, 38 Kan. 567, 16 Pac. 804; Sandoz v. Veazie, 106 La. Ann. 202, 30 So. 767; Moore v. Northern Pac. R. R. Co., 37 Minn. 147, 33 N. W. 334; Sebastian v. Cheney, 86 Tex. 497, 25 S. W. 691; Small v. McGovern, 117 Wis. 608, 94 N. W. 651; Hess v. Oregon Baking Co., 31 Ore. 503, 49 Pac. 803.

62—Wright v. Hanna, 98 Ind. 217; Brewer v. Jacobs, 22 Fed. Rep. 217; Lemay v. Williams, 32 Ark. 166; Ramsey v. Arrott, 64 Tex. 320; McClafferty v. Philp, 151 Pa. St. 86, 24 Atl. 1042; Smith v. Walters, 125 Pa. St. 453, 17 Atl. 466. In the last case the court says: "It is sometimes said that the advice of counsel furnishes probable cause for the prosecution, but this is not an accurate statement of the law. Absence of probable cause raises a presumption of malice, but the presumption may be rebutted by showing that malice did not in fact exist, and one of the ways of showing that fact is by showing the advice of counsel. It is not, however, the advice that rebuts the presumption of malice, but the innocence of the defendant's conduct, of which his seeking advice is merely evidence. Whether the advice

makes out a good defense or not, depends on the good faith with which it is sought and followed. Such good faith is shown by the candor, fullness and fairness of the client's statement, upon which the advice was based, and its adequacy in those respects, whenever it is disputed, is for the jury to determine upon all the evidence." pp. 468-9.

63—Vaun v. McCreary, 77 Cal. 434, 19 Pac. 826; Seabridge v. McAdams, 119 Cal. 460, 51 Pac. 691; Clement v. Major, 8 Colo. App. 86, 44 Pac. 776; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. 913; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. 969; Beidler v. Beunaert, 25 Ill. App. 422; Chicago Forge & Bolt Co. v. Rose, 69 Ill. App. 123; Gruel v. Mengler, 74 Ill. App. 36; Acton, v. Coffman, 74 Ia. 17, 36 N. W. 774; Johnson v. Miller, 82 Ia. 693, 48 N. W. 925, 31 Am. St. Rep. 514; Torsch v. Dell, 88 Md. 459, 41 Atl. 903; Burbanks v. Leposky, 134 Mich. 384, 96 N. W. 456; Kehl v. Hope Oil Mill, etc., Co., 77 Miss. 762, 27 So. 641; Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574; Smith v. Walters, 125 Pa. St. 453, 17 Atl. 466; Palmer v. Broder, 78 Wis. 483, 47 N. W. 744; Billingsley v. Maas, 93 Wis. 176, 67 N. W. 49; Ross v. Innis, 26 Ill. 259, 279; Center v. Spring, 2 Iowa, 393; Eastman v. Keasor, 44 N. H. 518; Potter v. Seale, 8 Cal. 217; Josse-lyn v. McAllister, 22 Mich. 300;

interested in the subject matter, or biased or prejudiced against the plaintiff.⁶⁴ But the fact that the advice is not given honestly and in good faith will not affect the defendant, if he was ignorant of the fact and had no reason to suspect it.⁶⁵ Some cases hold that the defendant must disclose to counsel all the facts known to him or which, by reasonable diligence, he might have ascertained, or in other words that the advice of counsel will be of no avail, if there are material facts which the defendant might have ascertained and submitted by the exercise of reasonable diligence, but failed to do so.⁶⁶ Other cases hold it sufficient if the defendant discloses all the material facts within his knowledge.⁶⁷ In one of the latter cases the court, speaking of the defendant's duty, says: "He is bound to make a full and fair disclosure of all the material facts within his knowledge; and, if he have reason to believe that there are other facts bearing upon the guilt or innocence of the accused, he must either disclose that belief to the prosecuting attorney, or himself make inquiry to ascertain the facts in relation to the matter, but more than

Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644; *Hill v. Palm*, 38 Mo. 13. In *Ravenga v. Mackintosh*, 2 Barn. & Cress. 692, 698, it is said to be "a question for the jury whether he acted *bona fide* on the opinion, believing that he had a cause of action." The mere fact of getting advice is not conclusive in favor of the defendant. *Lytton v. Baird*, 95 Ind. 349; *Hogg v. Pinckney*, 16 S. C. 387; *Lemay v. Williams*, 32 Ark. 166; *Ramsey v. Arrott*, 64 Tex. 320. The advice must be honestly given and acted on in good faith. *Allen v. Codman*, 139 Mass. 136; *Jordan v. Ala., etc., R. R. Co.*, 81 Ala. 220; *Parkhurst v. Masteller*, 57 Ia. 474; *Roy v. Goings*, 112 Ill. 656. No protection if sought as a means of covering malice. *McCarthy v. Kitchen*, 59 Ind. 500.

64—*White v. Carr*, 71 Me. 555, 36 Am. Rep. 533; *Perrenoud v. Helm*, 65 Neb. 77, 90 N. W. 980; *Adkin v. Pillen*, 136 Mich. 682, 100 N. W. 176.

65—*Seabridge v. McAdam*, 119 Cal. 460, 51 Pac. 691; *Shea v. Cloquet Lumber Co.*, 92 Minn. 348, 100 N. W. 111. In the former case an instruction that the advice must be sought and *given* in good faith was held to be erroneous.

66—*Motes v. Bates*, 80 Ala. 382; *Roy v. Goings*, 112 Ill. 656; *White v. Carr*, 71 Me. 555, 36 Am. Rep. 533; *National Surety Co. v. Mabrey*, 139 Ala. 217, 35 So. 698; *Parker v. Parker*, 102 Ia. 500, 77 N. W. 421; *Ahrens, etc., Mfg. Co. v. Hoeher*, 106 Ky. 692, 51 S. W. 194. Compare *Johnson v. Miller*, 69 Ia. 562.

67—*Holliday v. Holliday*, 123

this he is not required to do.’’⁶⁸ But when the defendant places himself under the guidance of counsel, if facts subsequently come to his knowledge which seem to be important, it is his duty to communicate these to counsel, if he expects to rely upon his advice as a justification in the steps subsequently taken.^{68a} The burden is on the defendant to show that he made a full and fair disclosure and acted in good faith and these are questions of fact for the jury.⁶⁹ The advice of counsel is a defense, though not warranted by the facts submitted,⁷⁰ but in New York it has been held that where the facts submitted do not show or tend to show a crime, the advice of counsel that they do will be of no avail.⁷¹

Proof of Probable Cause or the Want of It. A conviction of the accused is conclusive evidence of probable cause, unless it was obtained by fraud or unfair means, which may be shown in rebuttal,⁷² and this is true though afterwards, on appeal, the

Cal. 26, 55 Pac. 703; *Hess v. Oregon Baking Co.*, 31 Ore. 503, 49 Pac. 803.

68—*Hess v. Oregon Baking Co.*, 31 Ore. 503, 49 Pac. 803.

68a—*Cole v. Curtis*, 16 Minn. 182; *Ash v. Marlow*, 20 Ohio, 119.

69—*Williams v. Kyes*, 9 Colo. App. 190, 48 Pac. 663; *Chicago Forge & Belt Co. v. Rose*, 69 Ill. App. 123; *Webster v. Fowler*, 89 Mich. 303, 50 N. W. 1074; *Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122.

70—*Kompass v. Light*, 122 Mich. 86, 80 N. W. 1008.

71—*Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194. Says the court: “The fact that his counsel may have advised him otherwise, while proper upon the question of malice, does not form the basis for a finding of fact that he had probable cause to believe the plaintiff guilty of larceny. Probable cause

may be founded on misinformation as to the facts, but not as to the law.

“The facts within his knowledge did not indicate that a crime had been committed. They did not tend to cause a man with knowledge of the law to suspect or believe that it had been violated, and the defendant was bound to know the law.” p. 227.

72—*Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703; *Hartshorn v. Smith*, 104 Ga. 235, 30 S. E. 666; *Adams v. Bicknell*, 126 Ind. 210, 25 N. E. 804, 22 Am. St. Rep. 576; *Blucher v. Zonker*, 19 Ind. App. 615, 49 N. E. 911; *Barber v. Scott*, 92 Ia. 52, 60 N. W. 497; *Boogher v. Hough*, 99 Mo. 183, 12 S. W. 524; *Maynard v. Sigman*, 65 Neb. 590, 91 N. W. 576; *Misnier v. Denike*, 82 App. Div. 404, 81 N. Y. S. 818; *Price v. Stanley*, 128 N. C. 38, 38 S. E. 33; *Root v. Rose*, 6 N.

conviction is set aside or the accused acquitted.⁷³ Where one by fraud, duress and conspiracy was induced to plead guilty, the conviction was held no bar to a suit for malicious prosecution.⁷⁴ A waiver of examination by the accused is an admission of the existence of probable cause,⁷⁵ but is only *prima facie* evidence thereof.⁷⁶ So of a committment or binding over by the magistrate or of an indictment by the grand jury.⁷⁷ In Rhode Island it is held that the committment or indictment is conclusive of probable cause unless shown to have been procured by fraud or undue means.⁷⁸ The burden of proof to show a want of probable cause is upon the plaintiff.⁷⁹ In other words, the want of

D. 575, 72 N. W. 1022; Lawrence v. Cleary, 88 Wis. 473, 60 N. W. 793; Welch v. Boston, etc., R. R. Co., 14 R. I. 609; Phillips v. Kalamazoo, 53 Mich. 33; Womack v. Circle, 32 Gratt. 324. See Labar v. Crane, 49 Mich. 561.

73—Griffs v. Sellars, 4 Dev. & Bat. 176; Whitney v. Peckham, 15 Mass. 242; Payson v. Caswell, 22 Me. 212; Witham v. Gowen, 14 Me. 362; Hartshorn v. Smith, 104 Ga. 235, 30 S. E. 666; Adams v. Bicknell, 126 Ind. 210, 25 N. E. 804, 22 Am. St. Rep. 576; Blucher v. Zonker, 19 Ind. App. 615, 49 N. E. 911; Price v. Stanley, 128 N. C. 38, 38 S. E. 33; Root v. Rose, 6 N. D. 575, 72 N. W. 1022. A conviction, unreversed, if based on fraud, will not be conclusive of probable cause. Olson v. Neal, 63 Ia. 214; Mesnier v. Denike, 82 App. Div. 404, 81 N. Y. S. 818. Otherwise if unjust but not fraudulent. Severance v. Judkins, 73 Me. 376. Nor is the binding over by a magistrate. Diemer v. Herber, 75 Cal. 287, 17 Pac. Rep. 205. In the following cases a conviction reversed on appeal was held to be only *prima facie* evidence of probable cause: Nicholson v. Sternberg,

61 App. Div. 51, 70 N. Y. S. 212; Knight v. International, etc., Ry. Co., 61 Fed. 87, 9 C. C. A. 376.

74—Johnson v. Girdwood, 7 Misc. 651, 28 N. Y. S. 151.

75—Barber v. Scott, 92 Ia. 52, 60 N. W. 497; Jones v. Wilmington, etc., R. R. Co., 125 N. C. 227, 34 S. E. 398; Jones v. Wilmington, etc., R. R. Co., 127 N. C. 188, 37 S. E. 215; Jones v. Wilmington, etc., R. R. Co., 131 N. C. 133, 42 S. E. 559; Hess v. Oregon Baking Co., 31 Ore. 503, 49 Pac. 803.

76—Ibid.

77—Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703; Lewton v. Hower, 35 Fla. 58, 16 So. 616; Darnell v. Saller, 7 Ind. App. 581, 34 N. E. 1020; Ross v. Hixon, 46 Kan. 550, 26 Pac. 955, 26 Am. St. Rep. 123, 12 L. R. A. 760; Whaling v. Wells, 50 La. Ann. 562, 23 So. 447; Perkins v. Spaulding, 182 Mass. 218, 65 N. E. 72; Firer v. Lowery, 59 Mo. App. 92; Bechel v. Pacific Express Co., 65 Neb. 826, 91 N. W. 853; Guisti v. Del Papa, 19 R. I. 338, 33 Atl. 525; Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022.

78—Guisti v. Del Papa, 19 R. I. 338, 33 Atl. 525.

79—See on the burden of proof,

probable cause will not be inferred from the mere failure of the prosecution.⁸⁰ Nor does malice establish a want of probable cause, because, as is well said in one case, a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution;⁸¹ and, indeed, the offense itself, or the belief in its having been committed, is likely to excite malice. A discharge by a magistrate on the preliminary hearing, is evidence of want of probable cause, as is *the ignoring of a [*214] bill by a grand jury.⁸² But neither of these is conclu-

Abrath v. Northeastern Ry. Co. L. R. 11 Q. B. D. 440; *Legallee v. Blaisdell*, 134 Mass. 473; *McFarland v. Washburn*, 14 Ill. App. 369; *Sutton v. Anderson*, 103 Pa. St. 151; *Bernar v. Dunlap*, 94 Pa. St. 329; *Pomeroy v. Villavossa*, 31 Ill. App. 590; *Mosley v. Yearwood*, 48 La. Ann. 334, 19 So. 274; *Torsch v. Dell*, 41 Atl. 903. As to what is evidence of want of probable cause, *Krulevitz v. Eastern R. R.*, 143 Mass. 228.

80—*Boyd v. Cross*, 35 Md. 194, and cases cited; *Good v. French*, 115 Mass. 201; *Levy v. Brannan*, 39 Cal. 485; *Wilkinson v. Arnold*, 11 Ind. 45; *Frost v. Holland*, 75 Me. 108; *Anderson v. Friend*, 85 Ill. 135.

81—*Tindall*, Ch. J., in *Williams v. Taylor*, 6 Bing. 183, 186. And, see, *Heyne v. Blair*, 62 N. Y. 19, 22; *Foshay v. Ferguson*, 2 Denio, 617; *Skidmore v. Bricker*, 77 Ill. 164; *Ward v. Ward*, 77 Ill. 603; *Chapman v. Cawrey*, 50 Ill. 512; *Caperson v. Sproule*, 39 Mo. 39; *Hall v. Hawkins*, 5 Humph. 357; *Bell v. Percy*, 5 Ired. 83; *Center v. Spring*, 2 Clarke (Iowa), 393; *Cloon v. Gerry*, 13 Gray, 201; *Kidder v. Parkhurst*, 3 Allen, 393; *Wade v. Walden*, 23 Ill. 425; *Travis v. Smith*, 1 Pa. St. 234; *Stew-*

art v. Sonneborn, 98 U. S. 187; *Sharpe v. Johnson*, 76 Mo. 660; *Flickinger v. Wagner*, 46 Md. 580; *Bitting v. Ten-Eyck*, 82 Ind. 421, 42 Am. Rep. 505; *Meysenberg v. Engelke*, 18 Mo. App. 346.

82—*Mitchinson v. Cross*, 58 Ill. 366; *Cooper v. Utterbach*, 37 Md. 282; *Israel v. Brooks*, 23 Ill. 575; *Sappington v. Watson*, 50 Mo. 83; *Frost v. Holland*, 75 Me. 108; *Bornholdt v. Souillard*, 36 La. Ann. 103; *Sharpe v. Johnston*, 76 Mo. 660; *Hidy v. Murray*, 101 Ia. 65, 69 N. W. 1138; *Brown v. Viltur*, 47 La. Ann. 607, 1780, 193; *Rankin v. Crane*, 104 Mich. 6, 61 N. W. 1007; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Nolen v. Kaufman*, 70 Mo. App. 651; *Magowan v. Rickey*, 64 N. J. L. 402, 45 Atl. 804; *Smith v. Eastern B. & L. Assn.*, 116 N. C. 73, 20 S. E. 963; *Barhight v. Tammany*, 158 Pa. St. 545, 28 Atl. 135, 38 Am. St. Rep. 853; *Berhofer v. Loeffert*, 159 Pa. St. 374, 28 Atl. 216; *Ritter v. Ewing*, 174 Pa. St. 341, 34 Atl. 584; *Scott v. Dewey*, 23 Pa. Supr. Ct. 396; *Fox v. Smith*, 26 R. I. 1; *Harper v. Harper*, 49 W. Va. 661, 39 S. E. 661; *Bigelow v. Sickles*, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25; *Eggett v. Allen*, 119 Wis. 625, 96 N. W. 803. "But if a com-

sive.⁸³ But as already seen an acquittal on the merits is not evidence of the want of probable cause.⁸⁴ Where the plaintiff, after having been acquitted on a criminal charge, was arrested a second time on the same charge without any new evidence, the latter is *prima facie* without probable cause, though there was probable cause for the first arrest.⁸⁵ The fact that the prosecution was

mitment or indictment after hearing and examination is *prima facie* evidence of probable cause, then why should not a discharge under like conditions have the effect, *prima facie*, to show want of probable cause. The magistrate passes upon the same question in each event, and his determination should have like force, whether for a commitment or discharge. So we conclude that when there has been an examination before a magistrate, upon proof produced for the purpose of showing the defendant's guilt, and after a hearing the magistrate has discharged the defendant because there was not sufficient cause shown for believing him guilty under the statute, then that the discharge is *prima facie* evidence of want of probable cause. But this is subject to dispute, and may be overcome by competent proof that nevertheless probable cause did exist." *Stamper v. Raymond*, 38 Ore. 17, 35, 62 Pac. 20. Discharge on preliminary hearing held not admissible to show want of probable cause. *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 16 Atl. 554; *Farwell v. Laird*, 58 Kan. 402, 49 Pac. 518. In *Apgar v. Woolston*, 43 N. J. L. 57, it is held that the failure of the grand jury to indict is not *prima facie* evidence of want of probable

cause; but the finding of an indictment is *prima facie* evidence of probable cause. *Peck v. Chouteau*, 91 Mo. 138, 60 Am. Rep. 236; *Ricord v. Centr. Pac. & Co.*, 15 Nev. 167; *contra*, *Motes v. Bates*, 80 Ala. 382; so is recognizing to appear after waiver of examination. *Vansickle v. Brown*, 68 Mo. 627; so is the disagreement of the jury on first trial. *Johnson v. Miller*, 63 Ia. 529.

83.—*Parkhurst v. Masteller*, 57 Ia. 474; *Barber v. Gould*, 20 Hun. 446; *Sharpe v. Johnson*, 76 Mo. 660; *Raleigh v. Cook*, 60 Tex. 438; *Plassan v. La. Lottery Co.*, 34 La. Ann. 246; *Hale v. Boylen*, 22 W. Va. 234.

84.—*Ante*, p. 335 n. 80; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 16 Atl. 554; *Cleveland, & C. Ry. Co. v. Jenkins*, 75 Ill. App. 17; *Sweeney v. Penney*, 40 Kan. 102, 19 Pac. 382; *Boeger v. Langenberg*, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; *Obernalt v. Johnson*, 36 Neb. 772, 55 N. W. 220; *Eastman v. Monastes*, 32 Ore. 291, 51 Pac. 1095, 67 Am. St. Rep. 531; *Fox v. Smith*, 26 R. I. 1; *Bekkeland v. Lyons*, 96 Tex. 255, 72 S. W. 56. But see *Sutor v. Wood*, 76 Tex. 403, 13 S. W. 321; *Cullen v. Hanish*, 114 Wis. 24, 89 N. W. 900.

85.—*Hinson v. Powell*, 109 N. C. 534, 14 S. E. 301.

instituted for some ulterior purpose, as to enforce the payment of a debt or to obtain possession of property, is held to show a want of probable cause,⁸⁶ and to render the defendant liable.⁸⁷

Malice. The burden of proving that the prosecution was malicious is also upon the plaintiff.⁸⁸ If a want of probable cause is shown, malice may be inferred; but the deduction is not a necessary one,⁸⁹ and the mere discontinuance of a criminal *prosecution, or the acquittal of the accused, will estab- [*215]lish for the purposes of this suit neither malice nor want

86—*Paddock v. Watts*, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832; *Peden v. Mail*, 118 Ind. 560, 20 N. E. 446; *Whiteford v. Henthorn*, 10 Ind. App. 97, 37 N. E. 419; *Peterson v. Reisdorph*, 49 Neb. 529, 68 N. W. 943; *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101. But see *Strehlow v. Pettit*, 96 Wis. 22, 71 N. W. 102; *Woodman v. Prescott*, 65 N. H. 224, 19 Atl. 999.

87—*Williams v. Kyes*, 9 Colo. App. 220, 47 Pac. 839; *Daily v. Donath*, 100 Ill. App. 52; *Whiteford v. Henthorn*, 10 Ind. App. 97, 37 N. E. 419; *Pace v. Aubrey*, 43 La. Ann. 1052, 10 So. 381; *Gann v. Varnado*, 51 La. Ann. 370, 25 So. 79; *Hiatt v. Kinkaid*, 28 Neb. 721, 45 N. W. 236; *Sebastian v. Cheney*, 86 Tex. 497, 25 S. W. 691; *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101.

Facts held to show probable cause. *McDonald v. Atlantic, &c. Ry. Co.*, 3 Arizona 96, 21 Pac. 338; *Stuckey v. Savannah, &c. Ry. Co.*, 102 Ga. 782, 29 S. E. 920; *Chicago, &c. Ry. Co. v. Pierce*, 98 Ill. App. 368; *Knapp v. Chicago, &c. Ry. Co.*, 113 Ia. 532, 85 N. W. 769; *Jackson v. Linnington*, 47 Kan. 396, 28 Pac. 173, 27 Am. St. Rep. 300; *Atchison, &c. Ry. Co. v.*

Smith, 60 Kan. 4, 55 Pac. 272; *Christian v. Hanna*, 58 Mo. App. 37; *Mitchell v. Logan*, 172 Pa. St. 349, 33 Atl. 554; *Chicago, &c. Ry. Co. v. Kriski*, 30 Neb. 215, 46 N. W. 520; *Francis v. Tilyon*, 26 App. Div. 340, 49 N. Y. S. 797, Contra; *Gale v. Bohanan*, 73 Ia. 501, 35 N. W. 599; *Gould v. Gregory*, 133 Mich. 382, 95 N. W. 414; *Shannon v. Jones*, 76 Tex. 141, 13 S. W. 477.

88—*Dietz v. Langfitt*, 63 Pa. St. 234; *Purcell v. McNamara*, 9 East. 361; *Savil v. Roberts*, 1 Salk. 14, 15; *Willans v. Taylor*, 6 Bing. 183; *McKnown v. Hunter*, 30 N. Y. 625; *Flickinger v. Wagner*, 46 Md. 581.

89—*Pangburn v. Bull*, 12 Wend. 345; *Merriam v. Mitchell*, 13 Me. 439, 29 Am. Rep. 514; *Fuller v. Glidden*, 68 Me. 559; *Dietz v. Langfitt*, 63 Pa. St. 234; *Gilliford v. Windel*, 108 Pa. St. 142; *Mowry v. Whipple*, 8 R. I. 360; *Cooper v. Utterbach*, 37 Md. 282; *Harpham v. Whitney*, 77 Ill. 32; *Roy v. Goings*, 112 Ill. 656; *Holliday v. Sterling*, 62 Mo. 321; *Vansickle v. Brown*, 68 Mo. 627; *Ewing v. Sanford*, 19 Ala. 605; *Harkrader v. Moore*, 44 Cal. 144; *Paukett v. Livermore*, 5 Clarke (Iowa), 227; *Strickler v. Greer*, 95 Ind. 596;

of probable cause.⁹⁰ But if an arrest is made in a civil suit which is afterward voluntarily discontinued, the discontinuance has been held to furnish *prima facie* evidence of a want of probable cause.⁹¹ Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or corrupt design be shown.⁹² Sometimes the accompanying circumstances

Heap v. Parrish, 104 Ind. 36; Block v. Meyers, 33 La. Ann. 776; Bobsin v. Kingsbury, 138 Mass. 538; Falvey v. Faxon, 143 Mass. 284; Carson v. Edgeworth, 43 Mich. 241; Hoyt v. Fallett, 65 Tex. 550; Wagstaff v. Schippel, 27 Kan. 450; Stewart v. Sonneborn, 98 U. S. 187; Johnson v. Ebberts, 6 Sawy. 538; Murphy v. Hobbs, 7 Col. 541; Caseber v. Rice, 18 Neb. 203; Lunsford v. Dietrich, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37; Florence Oil & Ry. Co. v. Huff, 14 Colo. App. 281, 59 Pac. 624; Weil v. Israel, 42 La. Ann. 955, 8 So. 826; Torsch v. Dell, 88 Md. 459, 41 Atl. 903; Stamper v. Raymond, 38 Ore. 17, 62 Pac. 20; Baker v. Hornick, 57 S. C. 213, 35 S. E. 524. "To maintain an action for a malicious prosecution, two essential elements must concur—malice, and a want of probable cause. The inference of malice may be drawn from a want of probable cause; but such inference is subject to be rebutted by proof that the prosecutor, though not able to show probable cause, instituted the prosecution under an honest belief that the plaintiff was guilty of the offense charged; provided such belief is founded on facts and circumstances, which would produce in the mind of a reasonable and prudent man such serious suspi-

cion of the plaintiff's guilt as to repel the idea that the prosecutor was actuated by malice." Lunsford v. Dietrich, 86 Ala. 250, 253, 5 So. 461, 11 Am. St. Rep. 37. Compare Wilson v. Bowen, 64 Mich. 133, 31 N. W. 81.

90—Willans v. Taylor, 6 Bing. 183; Yocum v. Polly, 1 B. Mon. 358, 17 Am. Dec. 184; Skidmore v. Bricker, 77 Ill. 164; Kidder v. Parkhurst, 3 Allen, 393; Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505, and cases p. 335 n. 81. Spear v. Hiles, 67 Wis. 350; Hamilton v. Smith, 39 Mich. 222; Johns v. Marsh, 52 Md. 323; Jordan v. Ala., &c. Co., 81 Ala. 220; Gee v. Culver, 13 Ore. 598; Bekkeland v. Lyons, 96 Tex. 255, 72 S. W. 56. Mere ill-will without an act intended to injure is not malice. Peck v. Chouteau, 91 Mo. 138, 60 Am. Rep. 236.

91—Burhans v. Sanford, 19 Wend. 417; Nicholson v. Coghill, 4 B. & C. 21; Green v. Cochran, 43 Iowa, 544.

92—Page v. Cushing, 38 Me. 523; Barron v. Mason, 31 Vt. 139; Harpham v. Whitney, 77 Ill. 32. The jury are the exclusive judges of malice. Munns v. Dupont, 3 Wash. C. C. 31; Center v. Spring, 2 Clarke (Iowa), 393; Mitchel v. Jenkins, 5 B. & A. 587; Stewart v. Sonneborn, 98 U. S. 187; Vinal v.

show the bad motive very clearly, as for instance, where an arrest on an unfounded criminal charge was made use of to compel the surrender of securities to which both parties were equally entitled.⁹³ This is a sort of malice sufficiently common to need special mention. If probable cause exists no amount of malice will render the defendant liable.⁹⁴

What is an End of the Proceeding. The termination of the proceeding must, in general, be by a final acquittal.⁹⁵ It is not

Core, 18 W. Va. 1; *Torsch v. Dell*, 88 Md. 459, 41 Atl. 903; *Southwestern R. R. Co. v. Mitchell*, 80 Ga. 438, 5 S. E. 490; *Shannon v. Jones*, 76 Tex. 141, 13 S. W. 477; *Bartlett v. Hawley*, 38 Minn. 308, 37 N. W. 580. But whether the facts found are such as to warrant the inference of malice is for the court. *Sharpe v. Johnson*, 76 Mo. 660. When the court holds that there is a want of probable cause there is evidence of malice for the jury. When such want is the only evidence of malice the jury are not bound by the holding of the court to find malice. As evidence of malice the question of probable cause is wholly for the jury. *Hicks v. Faulkner*, L. R. 8 Q. B. D. 167; *Quartz Hill Co. v. Eyre*, L. R. 11 Q. B. D. 674.

93—*Kimball v. Bates*, 50 Me. 308. See *Willans v. Taylor*, 6 Bing. 183; *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Krug v. Ward*, 77 Ill. 603; *Prough v. Entrikey*, 11 Pa. St. 81; *Schmidt v. Weidman*, 63 Pa. St. 173; *Gann v. Varnado*, 51 La. Ann. 370, 25 So. 79. Or to enforce payment of a debt. *Ross v. Langworthy*, 13 Neb. 492; *Williams v. Kyes*, 9 Colo. App. 220, 47 Pac. 839; *Morgan v. Duffy*, 94 Tenn. 686, 30 S. W. 735.

94—*Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 16 Atl. 554; *Porter v. White*, 5 Mackey, 180; *Spitser v. Friedlander*, 14 App. D. C. 556; *Joiner v. Ocean S. S. Co.*, 86 Ga. 238, 12 S. E. 361; *Seamans v. Hoge*, 105 Ga. 159, 31 S. E. 156; *Smith v. Hall*, 37 Ill. App. 28; *Sanders v. Palmer*, 55 Fed. 217, 5 C. C. A. 77; *Staunton v. Goshorn*, 94 Fed. 52, 36 C. C. A. 75; *Rankin v. Crane*, 104 Mich. 6, 61 N. W. 1007.

95—*Bacon v. Towne*, 4 Cush. 217; *Boyd v. Cross*, 35 Md. 194; *Kirkpatrick v. Kirkpatrick*, 39 Pa. St. 288; *Williams v. Woodhouse*, 3 Dev. (N. C.) L. 257. A proceeding is terminated where verdict of not guilty is rendered; where grand jury ignore a bill; where *nol. pros.* is entered; where the accused has been discharged from jail or imprisonment. *Lowe v. Wartman*, 47 N. J. L. 413. If one brings an action while an appeal from a decision in his favor is pending and it is reversed his action falls. *Marks v. Townsend*, 97 N. Y. 590. Suit will not lie until the prosecution is terminated and the narr. must show such termination. *Southern Car & T. Co. v. Adams*, 131 Ala. 147, 32 So. 503;

enough that the parties in a case which they might *law- [*216] fully settle, have effected a compromise, and thereby terminated it.⁹⁶ Or that the defendant was discharged because the offense was misnamed in the papers, or because of formal defects.⁹⁷ But if the proceeding is *ex parte* to hold to bail, and the accused party has no opportunity to disprove the case made against him, he may maintain the suit, notwithstanding he was required to give bail;⁹⁸ and so he may, if on a preliminary examination before a magistrate on charge of crime he is discharged.⁹⁹ But where a new prosecution was commenced by the defendant in another court for the same offence, on the same day or within two months, the discharge by the magistrate was held not to be such a termination as would sustain the action.¹

McDaniel v. Nelms, 96 Ga. 366, 23 S. E. 407; Bouney v. King, 201 Ill. 47, 66 N. E. 377; Wilson v. Hale, 178 Mass. 111, 59 N. E. 632; Collins v. Campbell, 18 R. I. 738, 31 Atl. 832; White v. Apsley Rubber Co., 181 Mass. 339, 63 N. E. 885; Koehring v. Witte, 15 Tex. Civ. App. 646, 40 S. W. 63; King v. Johnston, 81 Wis. 578, 51 N. W. 1011. See Tyler v. Smith, 25 R. I. 486, 56 Atl. 683.

96—Rosenberg v. Hart, 33 Ill. App. 262; Lyenberger v. Paul, 40 Ill. App. 516; Gallagher v. Stoddard, 47 Hun. 101; Welch v. Cheek, 125 N. C. 353, 34 S. E. 531; McCormick v. Sisson, 7 Cow. 715; Hamilburgh v. Shephard, 119 Mass. 30; Mayer v. Walter, 64 Pa. St. 283. So if indictment quashed for insufficiency in law. McKensie v. Mo. Pac. Ry. Co. 24 Mo. App. 392. But if one compounds under protest to procure his discharge, this does not afterwards estop him from showing the groundlessness and malice of the proceeding. Morton v. Young, 55 Me. 24, 92

Am. Dec. 565. The fact alone that the plaintiff paid the costs on dismissal was held not to show such a compromise as would defeat his recovery. Daily V. Donath, 100 Ill. App. 52.

97.—Sears v. Hathaway, 12 Cal. 277.

98.—Stewart v. Gromett, 7 C. B. (N. S.) 191. Where a peace warrant is maliciously taken out, no termination need be shown. Hyde v. Greuch, 62 Md. 577.

99.—Cardinal v. Smith, 109 Mass. 158, 12 Am. Rep. 582; Sayles v. Briggs, 4 Met. 421; Burkett v. Lanata, 15 La. Ann. 337; Moyle v. Drake, 141 Mass. 238; Swensgaard v. Davis, 33 Minn. 368; Page v. Citizen's Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463; Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282; Rider v. Kite, 61 N. J. L. 8, 38 Atl. 754; Waldron v. Sperry, 53 W. Va. 116, 44 S. E. 283.

1—Hartshorn v. Smith, 104 Ga. 235, 30 S. E. 666; Schippel v. Norton, 38 Kan. 567, 16 Pac. 804. So

Whether the entry of a *nolle prosequi* by the prosecuting officer is a sufficient discharge has been made a question. In some cases it has been held that it was;² but other cases hold the contrary.³ The reason assigned in these last cases is, that the finding of the grand jury is some evidence of probable cause, and another indictment may be found on the same complaint. But the reasonable rule seems to be, that the technical prerequisite is only that the *particular prosecution be disposed of in [*217] such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one.⁴ A discharge on habeas corpus was held a sufficient termination in Pennsylvania,⁵ but otherwise in New York.⁶

as to bastardy proceedings. Coffey v. Myers, 84 Ind. 105.

2—Brown v. Randall, 36 Conn. 56, 4 Am. Rep. 34; Hays v. Blizzard, 30 Ind. 457; Chapman v. Woods, 6 Blackf. 504; Stanton v. Hart, 27 Mich. 539; Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135; Kennedy v. Holladay, 25 Mo. App. 503; Bell v. Matthews, 37 Kan. 686, 16 Pac. 97; Hatch v. Cohen, 84 N. C. 602, 37 Am. Rep. 630; Clegg v. Waterbury, 88 Ind. 21; Marcus v. Bernstein, 117 N. C. 31, 23 S. E. 38; Douglas v. Allen, 56 Ohio St. 156, 46 N. E. 707.

3.—Bacon v. Towne, 4 Cush. 217; Parker v. Farley, 10 Cush. 279; Brown v. Lakeman, 12 Cush. 482; Cardinal v. Smith, 109 Mass. 159, 12 Am. Rep. 582; Ward v. Reasor, 98 Va. 399, 36 S. E. 470. *Nol. pros.* not enough without order of discharge by Court. Langford v. Boston, etc., Co., 144 Mass. 431. But see Graves v. Dawson, 133 Mass. 419, where discharge, after binding over and before indictment, on motion of district attorney, followed by *nol. pros.* held sufficient.

4—Southern Car & T. Co. v. Adams, 131 Ala. 147, 32 So. 503; Clark v. Cleveland, 6 Hill, 344, 347; Casebeer v. Rice, 18 Neb. 203; Apgar v. Woolston, 43 N. J. L. 57. See Cardinal v. Smith, 109 Mass. 159, 12 Am. Rep. 682; Driggs v. Burton, 44 Vt. 124. It has been held that if one institutes a criminal proceeding, and is the prosecuting witness therein, but fails to appear after several adjournments, and the accused, for that reason, is suffered to go at liberty, this is sufficient termination of the prosecution, even though there be no record of the discharge. Leever v. Hamill, 57 Ind. 423. The dismissal of a complaint with intent, afterwards executed, of laying another in a higher court, is not a sufficient termination. Schipfel v. Norton, 38 Kan. 567, 16 Pac. 804.

5—Zebley v. Storey, 117 Pa. St. 478, 12 Atl. 569.

6—Hinds v. Parker, 11 App. Div. 327, 32 N. Y. S. 230; Vorce v. Oppenheim, 37 App. Div. 69, 55 N. Y. S. 596. See further as to what will constitute a sufficient termin-

Miscellaneous Questions in Malicious Prosecution. All concerned in originating and carrying on a malicious prosecution are jointly and severally responsible; it is not necessary that all should have been complainants.⁷ But if one merely furnishes the prosecuting officer with the facts, and the latter, on his own judgment, commences a prosecution, making use of the former as a witness, this is not a prosecution by the witness, and unless he interferes improperly afterwards, he cannot be held responsible as having instituted it.⁸ A corporation may be liable for mali-

ation of the prosecution; *Stark v. Bindley*, 152 Ind. 182, 52 N. E. 804; *Holmes v. Horger*, 96 Mich. 408, 56 N. W. 3; *Ingram v. Root*, 51 Hun 238, 3 N. T. S. 858; *Hill v. Egan*, 160 Pa. St. 119, 28 Atl. 646; *Koehring v. Witte*, 15 Tex. Civ. App. 646, 40 S. W. 63; *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101; *Strehlow v. Pettit*, 96 Wis. 22, 71 N. W. 102.

7—*Stansbury v. Fogle*, 37 Md. 369; *Clements v. Ohrlly*, 2 C. & K. 686; *Tangley v. Sullivan*, 163 Mass. 166, 39 N. E. 799; *Dann v. Wormser*, 38 App. Div. 460, 56 N. T. S. 474; *Johnson v. Miller*, 69 Ia. 562. An attorney's knowledge of his clients malice will not alone make him liable; otherwise if in addition he knows there is no probable cause. But he may act on such information as his client gives him. *Peck v. Chouteau*, 91 Mo. 138, 60 Am. Rep. 236; *Staley v. Turner*, 21 Mo. App. 244. If an agent of a corporation at the instigation and upon the advice of the company's attorney makes a complaint, he is not personally liable as prosecutor. *Jordan v. Ala.*, etc., R. R. Co., 81 Ala. 220. The treatment of the person by county officers is not an

element of damage against the prosecutor. *Zebley v. Storey*, 117 Pa. St. 478, 12 Atl. 569.

8—*O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905; *Chambliss v. Blau*, 127 Ala. 86, 28 So. 602; *Burnham v. Collateral Loan Co.*, 179 Mass. 268, 60 N. E. 617; *Clark v. Thompson*, 160 Mo. 461, 61 S. W. 194; *Boeger v. Langenberg*, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; *White v. Shradski*, 36 Mo. App. 635; *Wasserman v. Louisville*, etc., R. R. Co., 28 Fed. Rep. 802. See *Murphy v. Walters*, 34 Mich. 180, a case of false imprisonment. "The principles governing the rights and liabilities of the parties to an action for malicious prosecution are the result of a compromise between the right of the individual to be free from arrest or prosecution upon a charge of which he is innocent and the right of the community to be protected from crime. And one of these principles is that if a person discloses fairly and truthfully to the officer, whose duty it is to detect crime, all matters within his knowledge which, as a man of ordinary intelligence, he is bound to suppose, would have a material bearing upon the question of the

cious prosecution,⁹ but corporations and other principals are in general not liable for a malicious prosecution instituted by their agents, or servants for the supposed protection of the property of their principals,¹⁰ and this is especially true when the prosecution is instituted for a past crime. "Undoubtedly a principal may be held liable for the act of his agent in instituting a malicious prosecution. But the act of the agent becomes that of the principal only when expressly authorized, or when his authority to act may fairly be inferred from the nature and scope of the employment. Generally the duty of superintendence does not carry with it the duty to arrest or prosecute. The inference of authority to do either does not arise from the mere fact of the agency. The authority may be implied when the arrest is made by the agent, in the absence of the principal for the protection of property that is in danger, and in some cases it has been inferred when the arrest was to recover the property back, or when

innocence or guilt of the person suspected, and leaves the officer to act entirely upon his own judgment and responsibility as a public officer, as to whether or not there shall be a criminal prosecution, and does no more, he cannot be held answerable in an action for malicious prosecution, even if the officer comes to the wrong conclusion and prosecutes when he ought not to do so. Such a person does no more than his duty; and to hold him answerable in an action for malicious prosecution for the result of the mistake or misconduct of the officer would be to make the division line of compromise between the right of the individual to his liberty and the right of the public to protection trench too far upon the domain of the latter." *Burnham v. Collateral Loan Co.*, 179 Mass. 268, 274, 60 N. E. 617. But see *Holden v. Merritt*, 92 Ia, 707, 709,

710, 61 N. W. 390, where it is held that if one "on his own motion, gave information or made complaint to the officers of the law in such a manner as that, in the regular and ordinary course of events an arrest must be made or will probably follow, this is sufficient to warrant the jury in finding him the real prosecutor."

9—*Southern Car. & T. Co. v. Adams*, 131 Ala. 147, 32 So. 503; *Hibbard, Spencer, Bartlett & Co. v. Ryan*, 46 Ill. App. 313; *Willard v. Holmes*, 142 N. Y. 492, 37 N. E. 480.

10—*Robertson v. Marion*, 97 Ill. App. 332; *Singer Mfg. Co. v. Hancock*, 74 Ill. App. 556; *Flora v. Russell*, 138 Ind. 153, 37 N. E. 593; *Baltimore, etc., Turnpike Road v. Green*, 86 Md. 161, 37 Atl. 642; *Govaski v. Downey*, 100 Mich. 429, 59 N. W. 167; *Horton v. Newell*, 17 R. I. 571, 23 Atl. 910.

the crime was at the time being perpetrated. But when the act is done for the punishment of the supposed criminal, or for the vindication of the law, it is not the act of the principal and does not subject him to liability. * * * The trend of decision is against holding the principal liable when the arrest has been made after the supposed crime had been committed, and not for the protection of his property and interests. In such cases the agent has been presumed to have acted on his own account, for the vindication of justice.’¹¹

A member of the grand jury which returned an indictment against the plaintiff cannot be held liable for malicious prosecution for anything he did or said as such member.¹² A prosecution by one partner for larceny of the partnership property does not render the other partners liable without proof of complicity on their part.¹³ Malicious prosecution lies for maliciously and without probable cause causing a search warrant to be issued and served,¹⁴ and a failure to find the property is held a sufficient termination.¹⁵ So far an inquisition of lunacy.¹⁶

There is a difference of opinion as to whether malicious prosecution lies when the court issuing the process has no jurisdiction. The court of errors and appeals of New Jersey states the law upon this point as follows: “The distinction established by the cases is that when the affiant states the facts truly, and the judicial officer thereupon does an act which the law will not justify, the affiant is not liable, because in that case the grievance complained of arises from the mistake of the judge, and from no wrongful act of the affiant.

11—*Markley v. Snow*, 207 Pa. Mo. 127, 23 Am. Dec. 693; *Sprangler v. Booze*, 103 Va. 276, 49 S. R. A. 685. E. 42.

12—*Sidener v. Russell*, 34 Ill. App. 446; *Engelke v. Chouteau*, 98 Mo. 629, 12 S. W. 358. 15—*Sprangler v. Booze*, 103 Va. 276, 49 S. E. 42.

13—*Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551, 96 Am. St. Rep. 886. 16—*Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104; *Smith v. Nippert*, 76 Wis. 86, 44 N. W. 846, 20 Am. St. Rep. 26; *Smith v. Nippert*, 79 Wis. 135, 48 N. W. 253; *Lockenour v. Sides*, 57 Ind. 360.

14—*Carey v. Sheets*, 67 Ind. 375; *Harlan v. Jones*, 16 Ind. App. 398, 45 N. E. 481; *Miller v. Brown*, 3

"But when the affiant falsely and maliciously states the facts untruly, and procures, as in this case, a warrant to be issued, he becomes responsible for the prosecution and arrest, because if he had not made the false affidavit and asked for the issuing of a warrant, the judicial officer could not, and would not, have decided that criminal process should issue. The machinery of the criminal law is thereby put in operation by the act of the person who makes the affidavit."¹⁷ The action does not lie for merely making a complaint and suing out a warrant, where no arrest is made.¹⁸

Malicious Civil Suits—Bankruptcy Proceedings. In some cases an action may be maintained for the malicious institution of a civil suit, but the authorities are not entirely agreed what cases are embraced within the rule. The case of the malicious institution of proceedings in bankruptcy is undoubtedly one. If

17—*Navarino v. Dudrap*, 66 N. J. L. 620, 50 Atl. 353. These also hold that malicious prosecution will lie in such cases. *Finn v. Frink*, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348; *Potter v. Gjertsen*, 37 Minn. 386, 34 N. W. 746; *Sutor v. Wood*, 76 Tex. 403, 13 S. W. 321; *S. C. Ward v. Sutor*, 70 Tex. 343, 8 S. W. 5, 8 Am. St. Rep. 606; *Beuthner v. Ellinger*, 90 Wis. 439, 63 N. W. 756. Contra; *Satilla Mfg. Co. v. Carson*, 98 Ga. 14, 25 S. E. 909, 58 Am. St. Rep. 287; *Collum v. Turner*, 102 Ga. 534, 27 S. E. 680; *Berger v. Saul*, 113 Ga. 869, 39 S. E. 326; *Boyd v. Snyder*, 207 Pa. St. 330, 56 Atl. 924. Where the plaintiff was arrested and taken before a police justice and, no charge being made, was discharged, the remedy is false imprisonment, not malicious prosecution. *Barry v. Third Ave. R. R. Co.*, 51 App. Div. 385, 64 N. Y. S. 615.

18—*Swift v. Witchard*, 103 Ga.

193, 29 S. E. 762; *Cooper v. Armour*, 42 Fed. 215. The fact that the defendant's name was endorsed on the back of the indictment as the prosecuting witness is not sufficient proof of his complicity to render him liable. *Klug v. McPhee*, 16 Colo. App. 39, 63 Pac. 709. Where husband and wife are both arrested they must sue separately for damages to each. *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380. See *Swales v. Grubbs*, 6 Ind. App. 477, 33 N. E. 1124.

On the question of damages see: *Shatto v. Crocker*, 87 Cal. 629, 25 Pac. 921; *Coleman v. Allen*, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; *Mexican Cent. Ry. Co. v. Gehr*, 66 Ill. App. 173; *Evansville, etc., R. R. Co. v. Talbot*, 131 Ind. 221, 29 N. E. 1134; *Atkinson v. Van Cleave*, 25 Ind. App. 508, 57 N. E. 731; *Drumm v. Cessnum*, 61 Kan. 467, 59 Pac. 1078; *Rawson v. Leggett*, 97 App. Div. 416, 90 N. Y. S. 55.

these are instituted maliciously, and without probable cause, and terminate without an adjudication of bankruptcy, an action will lie for the damages sustained. "The general grounds of this action are, that the commission was falsely and malicious- [*218] ly sued out, that the *plaintiff has been greatly damaged thereby, scandalized upon record, and put to great charges in obtaining a supersedeas to the commission: here is falsehood and malice in the defendant, and great wrong done to the plaintiff thereby. Now, wherever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable he should have an action to repair himself."¹⁹

Same.—Arrest, Attachment, Garnishment. The case of a civil suit begun maliciously, and without probable cause, by the arrest of the party, is another.²⁰ So is the case of a suit commenced by an attachment of property,²¹ the reasons which support the ac-

19—See in *Chapman v. Pickersgill*, 2 Wils. 145, and *Farley v. Danks*, 4 El. & Bl. 493; *Whitworth v. Hall*, 2 B. & Ad. 695. So for causing a petition to be filed to wind up a trading company. *Quartz-Hill Co. v. Eyre*, L. R. 11. Q. B. D., 674.

20—*Lanzon v. Charroux*, 18 R. I. 467, 28 Atl. 975; *Collins v. Hayte*, 50 Ill. 337, 353, 99 Am. Dec. 521; *Burhans v. Sanford*, 19 Wend. 417; *Watkins v. Baird*, 6 Mass. 506; *Austin v. Debnam*, 3 B. & C. 139; *Sinclair v. Eldred*, 4 Taunt. 7. The voluntary discontinuance of such a suit is *prima facie* evidence of want of probable cause, but to suffer a judgment of *non pros.*, or as in case of nonsuit, is not. *Burhans v. Sanford*, 19 Wend. 417. See further *Fikumoto v. Marsh*, 130 Cal. 66, 62 Pac. 303, 509, 80 Am. St. Rep. 73; *Wachsmith v. Merchants' Nat. Bank*, 96 Mich. 426, 56 N. W. 9.

21—*Brown v. Master*, 104 Ala. 451, 16 So. 443; *Brown v. Master*, 111 Ala. 397, 20 So. 344; *Alsop v. Lidden*, 130 Ala. 548, 30 So. 401; *Clark v. Nordholt*, 121 Cal. 26, 53 Pac. 400; *Gurley v. Tomkins*, 17 Colo. 437, 30 Pac. 344; *French v. Guyot*, 30 Colo. 222, 70 Pac. 683; *Hibbard, Spencer, Bartlett & Co. v. Ryan*, 46 Ill. App. 313; *Swenson v. Erickson*, 90 Ill. App. 358; *Richards v. Jewett Bros.*, 118 Ia. 629, 92 N. W. 689; *Connelly v. White*, 122 Ia. 391, 98 N. W. 144; *Grimes v. Bowerman*, 92 Mich. 258, 52 N. W. 751; *Le Clear v. Perkins*, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; *Wiesinger v. First Nat. Bank*, 106 Mich. 291, 64 N. W. 59; *Byersdorf v. Sump*, 39 Minn. 495, 41 N. W. 101, 12 Am. St. Rep. 678; *Grant v. Reinhart*, 33 Mo. App. 74; *Jones v. Fruin*, 26 Neb. 76, 42 N. W. 283; *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800; *Leyser v. Fried*, 5 N. M. 356, 23 Pac. 173; *Willard v. Holmes*, 142 N. Y. 492,

tion in that case being much the same with those which have been found sufficient where commission in bankruptcy is sued out.²² And in Ohio it has been held that the suit will lie, even though there may have been a valid cause of action, if in fact there was no probable cause for the attachment, and it was taken out maliciously; also, *that it is not essential [*219] in such a case that the suit in attachment should be first terminated.²³ If, however, the validity of the attachment was allowed to be tested, and its justification inquired into, in some

37 N. E. 480; *Willard v. Holmes*, 2 Misc. 303, 21 N. Y. S. 998; *Pittsburgh, etc., R. R. Co. v. Wakefield Hardware Co.*, 138 N. C. 174; *Hamer v. First Nat. Bank*, 9 Utah 215, 33 Pac. 941; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. 233, 57 C. C. A. 469. Merely suing out the writ is not sufficient. It must be levied on the plaintiff's property. *Maskell v. Barker*, 99 Cal. 642, 34 Pac. 340. But see *Brand v. Hinchman*, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362. Malicious prosecution does not lie for the attachment of the plaintiff's property as the property of another. *Duncan v. Griswold*, 92 Ky. 546, 18 S. W. 354.

22—*Preston v. Cooper*, 1 Dill. 589; *Williams v. Hunter*, 3 Hawks, 545, 14 Am. Dec. 597; *Wood v. Weir*, 5 B. Mon. 544; *McCullough v. Grishobber*, 4 W. & S. 201; *Walser v. Thies*, 56 Mo. 89; *Holliday v. Sterling*, 62 Mo. 321; *Fullenwider v. McWilliams*, 7 Bush, 389; *Spengler v. Davy*, 15 Grat. 381; *Hayden v. Shed*, 11 Mass. 500; *Lindsay v. Larned*, 17 Mass. 190; *Pierce v. Thompson*, 6 Pick. 193; *Nelson v. Danielson*, 82 Ill. 545. If one believes upon reasonable grounds that the debt existed,

there is probable cause. *Kaufman v. Wicks*, 62 Tex. 234. That another creditor has sued out an attachment is not. *Carothers v. M'Ilhenny Co.*, 63 Tex. 138. Probable cause is to be determined by the same rules as in case of crimes. *Burton v. St. Paul & Co.*, 33 Minn. 189. Such action will not lie while the original action is pending on appeal. *Reynolds v. DeGeer*, 13 Ill. App. 113. If the defendant was not served with process in the attachment suit, it is not necessary for him to show that it terminated in his favor. *Bump v. Betts*, 19 Wend. 421. The fact that the plaintiff, in bringing suit, was compelled to give an indemnity bond, will not protect him against an action for the malicious suit. *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674. See *Burnap v. Wight*, 14 Ill. 301.

23—*Fortman v. Rotfler*, 8 Ohio St. 548, 72 Dec. 606, citing and relying upon *Tomlinson v. Warner*, 9 Ohio, 104. In a late case, where use of property had been enjoined, it is said an action lies whenever, by virtue of any order or writ in a cause, the defendant in that cause "has been deprived of his personal liberty, or the possession,

distinct proceeding while the suit itself was pending, we should say that a suit for maliciously suing out the writ could not be brought until the writ itself was dissolved or quashed. Suit lies for a malicious garnishment the same as for a malicious attachment.²⁴ In order to maintain the action it must be shown (1) that the attachment was wrongfully sued out, (2) that it was sued out maliciously, and (3) that it was sued out without probable cause.²⁵

Same.—Insanity Cases. Still another case in which an action will lie for the malicious institution of unfounded proceedings not criminal in their nature, is where they are taken to have the party declared insane, and put under guardianship. Such proceedings are almost necessarily damaging beyond what a civil suit can well be; and, if unfounded and malicious, deserve more than a mere punishment in costs.²⁶

Same.—Injunctions, Receivers and Other Suits That Interfere With Person or Property. So a suit for malicious prosecution will lie where the plaintiff's property or business has been interfered with by the appointment of a receiver,²⁷ the granting of an injunction,²⁸ or by writ of replevin.²⁹

use, or enjoyment of property of value." *Newark Coal Co. v. Upson*, 40 Ohio St. 17.

24—*Gunderman v. Buschner*, 73 Ill. App. 180.

25—*Brown v. Master*, 104 Ala. 451, 16 So. 443. As to the necessity for the termination of the attachment suit see *Alsop v. Lidden*, 130 Ala. 548, 30 So. 401; *Hibbard, Spencer, Bartlett & Co. v. Ryan*, 46 Ill. App. 313; *Brand v. Hinchman*, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362.

26—*Lockenour v. Sides*, 57 Ind. 360. See ante, p. 344 n. 16.

27—*Luby v. Bennett*, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261; *Burt v. Smith*, 181 N. Y. 1, 73 N. E. 495;

see *Liquid Carbonic Acid Mfg. Co. v. Convert*, 82 Ill. App. 39. In the Wisconsin case it was held that the prosecution was sufficiently terminated when judgment was given for plaintiff (defendant in the suit for a receiver) though the receiver's report had not been made or disposed of. In Colorado it has been held that an action will lie for falsely "suing out and prosecuting before the Commissioner of the General Land Office of the United States, an officer having jurisdiction, &c., a caveat impeaching the plaintiff's entry [of public lands] on the ground and allegation of fraud." *Hoyt v. Macon*, 2 Col. 113.

28—*Butchers & Co. v. Crescent*

Malicious Civil Suits when No Interference with Person or Property. In some cases it has been held that an action may be maintained for the malicious institution, without probable cause, of any civil suit which has terminated in favor of the defendant;³⁰ but the English authorities do not justify this statement, and *there is much good reason in what [*220] has been said in a Pennsylvania case, that "if the person be not arrested, or his property seized, it is unimportant how futile and unfounded the action might be; as the plaintiff, in consideration of law, is punished by the payment of costs."³¹

City &c. Co., 37 La. Ann. 874; Newark Coal Co. v. Upson, 40 Ohio St. 17; Wright v. Ascheim, 5 Utah 480, 17 Pac. 125; Glen Jean, etc. R. R. Co. v. Kanawha, etc. R. R. Co., 47 W. Va. 725, 35 S. E. 978; Bart v. Smith, 84 App. Div. 47, 82 N. Y. S. 186. The last case cites the following to the same point: Russell v. Farley, 105 U. S. 433, 438; Myers v. Block, 120 U. S. 206, 211; Palmer v. Foley, 71 N. Y. 106, 108; Mark v. Hyatt, 135 N. Y. 306, 310; Lawton v. Green, 5 Hun, 157, 161; S. C. 64 N. Y. 326, 331. It, of course, follows that the granting of a preliminary injunction is not conclusive evidence of probable cause, but the contrary is held in Short v. Spragins, 104 Ga. 628, 30 S. E. 810. Malicious prosecution does not lie for procuring a writ of estrepement, a preventive remedy. Eberly v. Rupp, 90 Pa. St. 259. Nor for bringing ejectment, Muldoon v. Rickey, 103 Pa. St. 110, 49 Am. Rep. 117; McNamee v. Minke, 49 Md. 122. See Allen v. Codman, 139 Mass. 636. It will for bringing successive groundless actions at a distance from defendant's home. Payne v. Donegan, 9 Ill. App. 566. See Magmer v.

Renk, 65 Wis. 364. If one has a set off allowed in a suit he cannot sue for malice in its prosecution. Dolan v. Thompson, 129 Mass. 205. So if two cross suits are settled. Sartwell v. Parker, 141 Mass. 405.

29—Brownstein v. Sahlein, 65 Hun, 365, 20 N. Y. S. 213; McPherson v. Runyon, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727.

30—See Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316, where the subject was fully and carefully examined. Also, Whipple v. Fuller, 11 Conn. 581, 29 Am. Dec. 330; Marbourg v. Smith, 11 Kans. 554; Burnap v. Albert, Taney, 244; Cox v. Taylor's Admr. 10 B. Mon. 17; Woods v. Finnell, 13 Bush, 628; Eastin v. Bank, 66 Cal. 123, 56 Am. Rep. 77.

31—Sharswood, J., in Mayer v. Walter, 64 Pa. St. 283, citing Ray v. Law, 1 Pet. C. C. 207; Kramer v. Stock, 10 Watts, 115; Cross v. Elliott, 69 Me. 387; Smith v. Hintrager, 67 Ia. 109. See Gonzales v. Cobliner, 68 Cal. 151; Brown v. Cape Girardeau, 90 Mo. 377. This subject has been treated at length in an article, discussing many cases by Mr. Lawson. 30 Am. Law Reg. 281, 353.

If every suit may be retried on an allegation of malice, the evils would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first.

Since the second edition was published this question has been much litigated and many learned opinions on the subject have been handed down, with the result that now the preponderance of authority seems to be in favor of the right to maintain the action.³² The reasons in support of the action are thus given in one of the cases referred to: One who maliciously sets in motion the formidable machinery of the courts to harass and oppress his neighbor "abuses the process of the law intended for parties who act in good faith, and his offense is of the same character, and only less in degree, with that of one who accompanies such an action with the seizure of the person or the property of the defendant. To refuse a remedy for the wrong in either case would violate the well-recognized rule of the common law that no injury, improperly inflicted, should go unredressed. The spirit of this rule, if not its letter, requires the courts, in every case where they find that one, in bad faith, has prostituted their process to gratify his malice, to afford the party so wronged personal redress for the damages sustained by him, when this is found to be in excess of the taxable costs of the suit."³³ It

32—McKenna *v.* Heinlen, 128 Cal. 97, 60 Pac. 668; Dowdell *v.* Carpy, 129 Cal. 168, 61 Pac. 948; Hurgren *v.* Union Mut. Life. Ins. Co., 141 Cal. 585, 75 Pac. 168; Porter *v.* Johnson, 96 Ga. 145, 23 S. E. 123; Carbondale Investment Co. *v.* Burdick, 67 Kan. 329, 72 Pac. 781; Livingstone *v.* Hardin Bros., 41 La. Ann. 311, 6 So. 129; Davis *v.* Stuart, 47 La. Ann. 378, 16 So. 871; McPherson *v.* Runyon, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727; O'Neill *v.* Johnson, 53 Minn. 439, 55 N. W. 301, 39 Am. St. Rep. 615; Eickhoff *v.* Fidelity & Casualty Co., 74 Minn. 139, 76 N. W. 1030; Smith *v.* Barrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59; Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615; Foster *v.* Denison, 19 R. I. 351, 36 Atl. 93; Lipscomb *v.* Shofner, 96 Tenn. 112, 33 S. W. 818; Swepson *v.* Davis, 109 Tenn. 99, 70 S. W. 65; Porter *v.* Mack, 50 W. Va. 581. And see Pawlowski *v.* Jenks, 115 Mich. 275, 73 N. W. 238; Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

33—Lipscomb *v.* Shofner, 96 Tenn. 112, 115, 116, 33 S. W. 818. It is said in this case that such actions were entertained in the

is held that the want of probable cause must be very palpable and that greater latitude in the doctrine of reasonable cause must be exercised in such cases than would be permissible in an action for maliciously prosecuting a criminal case.

On the other hand a number of courts, hold that an action will not lie for the malicious prosecution of a civil suit when there is no interference with person or property.^{33a} The reasons in support of this view are well stated by the supreme court of Illinois, which says: "Those, who favor the doctrine that courts ought to permit suits of this character to be brought and prosecuted, urge in support of it the common law maxim, that for every wrong the law furnishes a remedy. It is said that, when a civil suit is maliciously prosecuted without probable cause, the defendant undergoes expenses, and suffers injury from loss of time, and often from loss of credit; and that these wrongs he must endure without a remedy, if he cannot bring suit for damages for the prosecution of such malicious action. On the other hand, it must be remembered that the courts are open to every citizen; and every man has a right to come into a court of justice and claim what he deems to be his right without fear of being prosecuted for heavy damages. If such actions are allowed, it might oftentimes happen that an honest suitor would be deterred from ascertaining his legal rights through fear of being obliged to defend a subsequent suit, charging him with malicious prosecution." "Those, who favor this species of action, also claim that, if the courts refuse to allow such actions to be maintained, litigation will be encouraged, and causeless

English courts prior to the statute of Marlbridge 52 Henry III, which provided for costs in civil actions. A similar statement of the grounds of the action will be found in *Pope v. Pollock*, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255.

33a—*Smith v. Michigan Buggy Co.*, 175 Ill. 619, 51 N. E. 569; *Smith v. Michigan Buggy Co.*, 66

Ill. App. 516; *Bartlett v. Christ-helf*, 69 Md. 219, 14 Atl. 518; *Enfield v. Colburn*, 63 N. H. 218; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Terry v. Davis*, 114 N. C. 31, 18 S. E. 943; *Muldoon v. Rickey*, 103 Pa. St. 110; *Mayer v. Walter*, 64 Pa. St. 283; *Norcross v. Otis Bros. & Co.*, 152 Pa. St. 481, 25 Atl. 575, 34 Am. St. Rep. 669; *Paul v. Fargo*, 84 App. Div. 9, 83 N. Y. S. 369.

and unfounded civil suits will be apt to be brought. On the contrary, the danger is that litigation will be promoted and encouraged by permitting such suits as the present action to be brought. This is so, because the conclusion of one suit would be but the beginning of another. A defendant, who had secured a favorable result in the suit against him, would be tempted to bring another suit for the purpose of showing, that there had been malice and want of probable cause in the prosecution of the first suit which he had won. Litigation would thus become interminable. Every unsuccessful action would be apt to be followed by another, alleging malice in the prosecution of the former action. There would thus be substantially a trial of every lawsuit twice instead of once, because in order to show that the first suit was malicious and without probable cause, it would be necessary to go over again the material facts that had been developed by the proof in such suit.'³⁴

The supreme court of Ohio in *Pope v. Pollock*,³⁵ in a carefully considered opinion, decided that such an action could be maintained, but in a later case took a contrary view.³⁶ The supreme court of New York denies the right to maintain the action³⁷ but the court of appeals has not passed on the question.³⁸

Same Rules Apply to Actions for Malicious Civil Suits as for Criminal Prosecution. It is laid down or assumed in all the

34—*Smith v. Michigan Buggy Co.*, 175 Ill. 619, 629, 630, 51 N. E. 569, citing *Potts v. Imlay*, 4 N. J. L. 330; *Bitz v. Meyer*, 40 N. J. L. 252; *Muldoon v. Rickey*, 103 Pa. St. 110; *Kramer v. Stock*, 10 Watts, 115; *Eberly v. Rupp*, 90 Pa. St. 259; *Mayer v. Walter*, 64 Pa. St. 283; *Wetmore v. Mellinger*, 64 Ia. 741; *Smith v. Hintrager*, 67 Ia. 109; *McNamee v. Minke*, 49 Md. 122; *Supreme Lodge v. Unverzagt*, 76 Ia. 104; *Terry v. Davis*, 114 N. C. 31; *Ely v. Davis*, 111 N. C. 24; *Mitchell v. Southwestern R. R. Co.* 75 Ga. 398.

35—46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255.

36—*Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433. The former case is distinguished, not overruled.

37—*Paul v. Fargo*, 84 App. Div. 9, 83 N. Y. S. 369.

38—*Ferguson v. Arnaw*, 142 N. Y. 580, 37 N. E. 626 was such a case but was disposed of on the ground that want of probable cause was not shown.

cases that an action for the malicious prosecution of a civil suit is governed by the same principles as one for the malicious prosecution of a criminal action.³⁹ There must be malice and the want of probable cause and the same rules apply in the proof or disproof of these elements.⁴⁰ So the advice of counsel will have the same effect as in case of criminal prosecution, under the same conditions.⁴¹ And the malicious suit must be terminated in favor of the plaintiff in that action.⁴² In a suit for a partnership accounting the plaintiff alleged fraud and the misappropriation of funds by the defendant. On the hearing these latter allegations were held to be unfounded but the plaintiff had a decree for a sum of money found due on the accounting. The defendant claiming that the charges of fraud and misfeasance formed the main contention in the suit and that these were malicious and without probable cause and had been adjudged unfounded, sued the plaintiff for malicious prosecution. It was held that malicious prosecution could not be founded on a separate issue within a suit and that the judgment for the plaintiff was a bar.⁴³

39—*Dowdell v. Carpy*, 129 Cal. 168, 61 Pac. 948; *Gurley v. Tomkins*, 17 Colo. 437, 30 Pac. 344; *Woodley v. Coker*, 119 Ga. 226, 46 S. E. 89; *Carbondale Investment Co. v. Burdick*, 67 Kan. 329, 72 Pac. 781; *Le Clear v. Perkins*, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; *Grant v. Reinhart*, 33 Mo. App. 74; *Jones v. Fruin*, 26 Neb. 76, 42 N. W. 283; *Harner v. First Nat. Bank*, 9 Utah, 215, 33 Pac. 941.

40—*Ibid*; *Hurgreen v. Union Mut. Life Ins. Co.* 141 Cal. 585, 75 Pac. 168; *Porter v. Johnson*, 96 Ga. 145, 23 S. E. 123; *Georgia Loan & T. Co. v. Johnston*, 116 Ga. 628, 43 S. E. 27; *Richards v. Jewett Bros.* 118 Ia. 629, 92 N. W. 689; *Connelly v. White*, 122 Ia. 391, 98 N. W. 144; *Willard v.*

Holmes, 142 N. Y. 492, 37 N. E. 480.

41—*Connelly v. White*, 122 Ia. 391, 98 N. W. 144; *Le Clear v. Perkins*, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; *Wiesinger v. First Nat. Bank*, 106 Mich. 291, 64 N. W. 59; *Pawlowski v. Jenks*, 115 Mich. 275, 73 N. W. 238.

42—*Fulton Grocery Co. v. Mad-dox*, 111 Ga. 260, 36 S. E. 647; *Liquid Carbonic Acid Mfg. Co. v. Convert*, 82 Ill. App. 39; *Bonney v. King*, 103 Ill. App. 601; *Davis v. Stuart*, 47 La. Ann. 378, 16 So. 871; *Swepson v. Davis*, 109 Tenn. 99, 70 S. W. 65.

43—*Swepson v. Davis*, 109 Tenn. 99, 70 S. W. 65. The court says: "We know of no authority, and have been cited to none, holding that it is necessary for the plain-

Malicious Abuse of Process. If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse for which an action will lie.⁴⁴ The following are illustrations: Entering up a judgment and suing out execution after the demand is satisfied;⁴⁵ suing out an attachment for an amount greatly in excess of the debt;⁴⁶ causing an arrest for more than is due;⁴⁷ levying an execution for an excessive amount;⁴⁸ causing an arrest when the party cannot procure bail, and keeping him imprisoned until, by stress thereof, he is compelled to surrender property to which

tiff in his original suit to sustain every allegation or charge made in his bill, or else be liable to a suit for malicious prosecution. If this be the correct doctrine, then in every suit for malicious prosecution there must be a separate investigation and retrial, of each separate allegation made in the original suit, without reference to the result of the suit as a whole, and the final decree therein. The only sound and tenable rule in cases of malicious prosecution is that adopted by all the courts, and that is to settle the question whether the suit was successfully prosecuted or not by the decree therein upon the final adjudication, and not by the separate allegations and charges, and the proof for and against each." p. 116.

44—Phoenix Mut. Life Ins. Co. v. Arbuckle, 52 Ill. App. 33; Jeffery v. Robbins, 73 Ill. App. 353; Bonney v. King, 201 Ill. 47, 66 N. E. 377; Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518; White v. Apsley Rubber Co. 181 Mass. 339, 63 N. E. 885; Jackson v. Telegraph Co. 139 N. C. 347; Lauzon v. Charroux, 18 R. I. 467, 28 Atl. 975.

Trespass is not the proper form of action for abuse of valid process. Lowry v. Hatley, 30 Ill. App. 297.

45—Barnett v. Reed, 51 Pa. St. 190, 88 Am. Dec. 574. See Hathaway v. Smith, 117 Ga. 946, 43 S. E. 984.

46—Clark v. Nordholt, 121 Cal. 26, 53 Pac. 400; Savage v. Brewer, 16 Pick. 453, 28 Am. Dec. 255; Zinn v. Rice, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288; Zinn v. Rice, 161 Mass. 571, 37 N. E. 747; Moody v. Deutsch, 85 Mo. 237.

47—Jenings v. Florence, 2 C. B. (N. S.) 467; Austin v. Debnam, 3 B. & C. 139.

48—Sommer v. Wilt, 4 S. & R. 19; Churchill v. Siggers, 3 El. & Bl. 929. In this case, Lord CAMPBELL, Ch. J., says, p. 937: "To put into force the process of the law maliciously, and without any reasonable or probable cause, is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case. Process of execution on a judgment seeking to obtain satisfaction for the sum recovered is *pri-*

the other is not entitled.⁴⁹ In these cases, proof of actual malice is not important, except as it may tend to aggravate damages; it is enough that the process was willfully abused to accomplish some unlawful purpose.⁵⁰

“Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and second, an act in the use of the process not proper in

ma facie lawful; and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied, and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the want of probable cause, the only remedy for the judgment-debtor is to apply to the court or judge that he may be discharged and that satisfaction may be entered up on the payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by an action where his person is, or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause: *i. e.*, the creditor well knowing that the sum for which the execution is sued out is excessive, and his motive being to oppress and injure the debtor. The court or judge, to whom a summary application is made for the debtor's liberation, can give no redress beyond putting an end to the process of execution on payment of the sum due, although, by the excess, the debtor may have suffered long imprisonment,

and have been utterly ruined in his circumstances.”

49—*Grainger v. Hill*, 4 Bing. N. C. 212; *Krug v. Ward*, 77 Ill. 603. So filing a notice *lis pendens* charging that the owner was not the real owner. *Smith v. Smith*, 20 Hun, 555. So arresting an engineer late at night when about to take out a train, when arrest might have been made during the day. *Smith v. Weeks*, 60 Wis. 94. False imprisonment will lie for malicious abuse of lawful process after arrest. *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95. The action is confined to a use of process to compel defendant to do some collateral thing which he could not lawfully be compelled to do. *Johnson v. Reed*, 136 Mass. 421. And see *Bartlett v. Christhif*, 69 Md. 219, 13 Atl. 518. To sustain an action for abuse of process both malice and want of probable cause, must be shown and advice of counsel may be a defense. *Emerson v. Cochran*, 111 Pa. St. 619; *Eberly v. Rupp*, 90 Pa. St. 259. See also *Juchter v. Boehm*, 67 Ga. 534, 44 Am. Rep. 724; *Crusselli v. Pugh*, 71 Ga. 744; *Contra*, probable cause need not be shown. *Hazard v. Harding*, 63 How. Pr. 326.

50—See *Stewart v. Cole*, 46 Ala. 646.

the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process."⁵¹ In a suit for malicious abuse of process it is not necessary that there should have been a termination of the suit in which the process was issued, nor a want of probable cause for the suit.⁵² Where the defendant in a writ of forcible entry and detainer was ejected under the writ on a cold, cloudy day, while she was sick with measles and still broken out, and by reason of the exposure she died in a few days, it was held a case of abuse of process, and the plaintiff in the writ, being present and directing, was held liable for the death.⁵³

Arrests for an Ulterior Purpose. One way in which process is sometimes abused, is by making use of it to accomplish not the ostensible purpose for which it is taken out, but some other purpose for which it is an illegitimate and unlawful means. An illustration is where, by means of a subpœna, and on pretence of desiring his testimony, a person is brought within the reach of process which otherwise could not have been served upon him. Here there may in strictness be no unlawful action, and possibly no suit would lie; but it is the duty of the court, where the service of the writ is brought about by deception through abuse of other process, or by any unlawful act, to take care that no benefit be derived from it. The effectual mode to accomplish this will be to set aside the service as unauthorized. It has, therefore,

51—*Bonney v. King*, 201 Ill. 47, 51, 66 N. E. 377. In *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993, the court distinguishes between the malicious *use* and the malicious *abuse* of process as follows: "The former exists when legal process, civil or criminal, is used out of malice and without just cause, but only its regular execution is contemplated. There is a malicious abuse of process when a party, under process legally and properly issued, employs it wrongfully and unlawfully and

not for the purpose it is intended by law to effect." pp. 134-5. To same effect: *Emery v. Ginnan*, 24 Ill. App. 65; *Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975.

52—*Emery v. Ginnan*, 24 Ill. App. 65; *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288; *White v. Apsley Rubber Co.*, 181 Mass. 339, 63 N. E. 885; *Pittsburgh, etc., R. R. Co. v. Wakefield Hardware Co.*, 138 N. C. 174.

53—*Bradshaw v. Frazier*, 113 Ia. 579, 85 N. W. 752, 86 Am. St. Rep. 394, 55 L. R. A. 258.

been very justly said that the courts will not tolerate service of process on any person who, for that purpose, has been deceitfully brought within their jurisdiction;^{53a} a court will also protect from arrest "*eundo et redeundo*," not only the parties, but also the *witnesses, who in obedience to its process, [*222] or in furtherance of its proceedings, appear within its jurisdiction.⁵⁴ So, if a party is detained over Sunday, when civil process cannot be served, and is arrested the next day, he will be discharged;⁵⁵ and so if he is detained on a void writ, or one that has become *functus officio*,⁵⁶ or without any writ at all, until one shall be obtained.⁵⁷ So if service is accomplished by unlawfully breaking into a dwelling-house.⁵⁸ The principle is, that no one shall derive advantage from abuse of the process of the courts, or by his own fraud or other misconduct. And the principle should apply to cases where the process of extradition, either as between the States or as between one sovereignty and another, is resorted to for the purpose of obtaining service of civil process.⁵⁹

53a—Sweet v. Kimball, 166 Mass. 332, 44 N. E. 243, 5 Am. St. Rep. 406.

54—ROBINSON, J., in Slade v. Joseph, 5 Daly, 187. See Luttin v. Benin, 11 Mod. 50; United States v. Edme, 9 S. & R. 147; Goupil v. Simonson, 3 Abb. Pr. 474. The court will not sanction any attempt to bring a party within its jurisdiction by fraud or misrepresentation. Carpenter v. Spooner, 2 Sanf. 717, 718; Baker v. Wales, 45 How. Pr. 137; McNab v. Bennett, 64 Ill. 158. Service of process on one fraudulently brought within the jurisdiction is null and void. Wood v. Wood, 78 Ky. 624; Durringer v. Moschino, 93 Ind. 495. But the arrest of a witness is not a cause for action apart from malice and want of probable cause. The remedy is by application for

discharge. Smith v. Jones, 76 Me. 138.

55—Lyford v. Tyrrel, Anstr. 85; Wells v. Gurney, 8 B. & C. 769. Procuring arrest in order to serve other process is an abuse of process. Service will be set aside. Byler v. Jones, 79 Mo. 261, 22 Mo. App. 623.

56—Loveridge v. Plaistow, 2 H. Bl. 29; *Ex parte* Wilson, 1 Atk. 152.

57—Birch v. Prodder, 4 B. & P. 135; Barlow v. Hall, 2 Anstr. 462.

58—Ilsley v. Nichols, 12 Pick. 270, 22 Am. Dec. 425; People v. Hubbard, 24 Wend. 369, 35 Am. Dec. 628; Swain v. Mizner, 8 Gray, 182, 69 Am. Dec. 244.

59—See Wharton, Conf. L. § 2965; *In re* Hawes, 4 Am. Law Times Rep. (N. S.) 524; Compton v. Wilder, 40 Ohio St. 130. But if

In some of the cases above mentioned, an action for false imprisonment would lie; but where there has been no actual illegal detention, the fraudulent use of the process to bring one within a jurisdiction must be actionable.⁶⁰

Officer Serving his own Process. The law will not permit an officer to serve process in a case in which he is a party or is the complainant. "The law wisely foreseeing that the ministers of justice should be freed, as far as practicable, from all the improper bias which may result from self-interest, has declared that no man shall be his own officer, and that no one shall in his own person, and by his own hand, do himself right by legal process. Therefore, where an officer is interested, it declares that another shall act; and this, in principle, applies to all, though to some with greater, others with less, force."⁶¹ Nor can any reasonable distinction be taken as respects the nature of the process or the degree of interest; the broad ground is the safest, that no officer who is interested in a suit, or who is even a party to it without interest, shall serve any process appertaining to it from the commencement to the conclusion.⁶² This is by no means a mere technical rule, but as the law, upon very imperative reasons, makes official returns conclusive for very many purposes, a different doctrine would be equivalent, in numerous cases, to making the officer judge in his own cause, and placing the other party at his mercy. A service, therefore, by the officer in such a case must be a mere nullity.⁶³

Where an officer cannot act, neither can the deputy, since the

the creditor has had no part in the extradition he may proceed in a civil action. *Nichols v. Goodheart*, 5 Ill. App. 574.

60—Where those not privy to the fraud obtain service by means thereof, such service is valid. *Slade v. Joseph*, 5 Daly, 187. See *State v. Ross*, 21 Iowa, 467; *Adriance v. Lagrave*, 59 N. Y. 110, 17 Am. Rep. 317.

61—Colcock, J., in *Singletary*

v. Carter, 1 Bailey, 467, 21 Am. Dec. 480.

62—*Singletary v. Carter*, 1 Bailey, 467, 21 Am. Dec. 480; *Knott v. Jarboe*, 1 Met. (Ky.) 504; *Gage v. Graffan*, 11 Mass. 181; *Chambers v. Thomas*, 3 A. K. Marsh, 536; *Boykin v. Edwards*, 21 Ala. 261; *Woods v. Gilson*, 17 Ill. 218; *Ford v. Dyer*, 26 Miss. 243; *Filkins v. O'Sullivan*, 79 Ill. 524.

63—It is sometimes forbidden

deputy can act only for him and in his name.⁶⁴ And if the officer is not a party, but is the husband of a party this also would disqualify him.⁶⁵

Arrest of Privileged Persons. The arrest of a person privileged from arrest is not a trespass, even though [*224] the officer may be aware of the facts. It is only voidable; the party may waive his privilege, or at his option he may apply for his discharge to the court in which the suit is commenced, or on *habeas corpus*: and where the privilege is given on public grounds, or for the benefit of another, he may be discharged on the proper application of any one concerned. Thus, if a witness is arrested while in attendance on court as such, the party who has subpœnaed him may move for his discharge, or the court, of its own motion, may order it.⁶⁶

by statute, but where that is the case the statute is generally looked upon as affirming common law principles. See *Knott v. Jarboe*, 1 Met. (Ky.) 504.

64—*Gage v. Graffan*, 11 Mass. 181; *May v. Walters*, 2 McCord, 470.

65—See *Scanlan v. Turner*, 1 Bailey, 421. The exclusion ought to go further, and embrace near kinship, and perhaps does. One difficulty may be encountered in some of our statutes, which make provision for a service by some other officer when a sheriff is interested or a party, but do not go further.

It is held in New York that the officer may serve the process in his own favor by which suit is commenced, if it is not process of arrest. *Bennett v. Fuller*, 4 Johns. 486; *Tuttle v. Hunt*, 2 Cow. 436; *Putnam v. Man*, 3 Wend. 202, 20 Am. Dec. 686. The danger of such a doctrine is perceived in the last case, in which it is held

that the constable's return of service of a summons in his own favor is not traversable.

66—*Blight v. Fisher*, Pet. C. C. 41; *Tarleton v. Fisher*, Doug. 671; *Magnay v. Burt*, 5 Q. B. 381; *Yearsley v. Heane*, 14 M. & W. 322, 334; *Fletcher v. Baxter*, 2 Aik. 224; *Waterman v. Merritt*, 7 R. I. 345; *Fox v. Wood*, 1 Rawle, 143; *Aldrich v. Aldrich*, 8 Met. 102; *Wilmarth v. Burt*, 7 Met. 257; *Smith v. Jones*, 76 Me. 138. The exemption extends to service of civil summons. *In re Healey*, 53 Vt. 694; *Kauffman v. Kennedy*, 25 Fed. Rep. 785. *Gregg v. Sumner*, 21 Ill. App. 110. But not to case of arrest for an indictable offense. *Ex parte Levi*, 28 Fed. Rep. 651.

Where one has come into the jurisdiction as a plaintiff and then been subpœnaed as a witness in another court, he is privileged from service of process while such witness, to which he would not have been liable unless he had come into the jurisdiction. Small

The Right of Privacy. Since the second edition of this work was published, the existence of a right of privacy, or right to be let alone, has been considerably discussed in the courts and legal periodicals. The question has arisen mostly in suits to enjoin or recover damages for the unauthorized use of one's name or likeness for advertising purposes. So far, we believe, the question has been squarely presented and squarely decided by but two courts of last resort. The New York court of appeals has decided against the right by a bare majority of four to three. In a more recent case the supreme court of Georgia has unanimously affirmed the existence of the right. In the New York case the opinion of the court was rendered by Chief Justice PARKER and is based upon the lack of any precedent, the failure of the great commentators on the common law to even mention such a right, and especially upon the evil consequences that would attend the judicial establishment of such a right. Upon the latter point the learned judge says: "If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And were the right of privacy once legally asserted it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely left alone. An insult would certainly be

v. Montgomery, 23 Fed. Rep. 707. One is privileged from service of a summons while in another state attending to taking of depositions to be used in suit of his in his own state, service being made before he can return home after the close of such taking. *Green v. Youngs*, 17 Ill. App. 106. *Contra*, *Parker v. Manco*, 61 Hun, 519, 16 N. Y. S. 325. A non-resident defendant attending a U. S. court at which his presence is necessary, is privileged from service of a new writ against him. *Wilson Sewing Machine Co. v. Wilson*, 22 Fed. Rep. 803.

in violation of such a right and with many persons would more seriously wound the feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply. I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.”⁶⁷

The suit was brought by a young woman to enjoin the use of her likeness by the defendants in advertising their wares. The supreme court sustained the motion and granted the relief.⁶⁸ This decision was reversed by the court of appeals in the case referred to. The dissenting opinion was rendered by Mr. Justice GRAY and was not only concurred in by his two associates but has been fully approved and adopted by the supreme court of Georgia. We quote from this opinion to show the nature of the right and the grounds upon which it is based. “The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the compliment to the right to the immunity of one’s person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone.”⁶⁹ The principle is fundamental and essential in organized society that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no

67—*Roberson v. Rochester Folding Box Co.*, 64 App. Div. 30, 71 N. Y. S. 538, 544, 171 N. Y. S. 876.
 68—*Roberson v. Rochester Folding Box Co.*, 171 N. Y. S. 538, 544, 64 N. E. 442, 89 Am. St. Rep. 828.
 69—Citing *Cooley on Torts*, p. 29.

68—*Roberson v. Rochester Fold-*

one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right, or privilege, the absence of exact precedent and the fact that early commentators on the common law have no discussion on the subject are of no material importance in awarding equitable relief. * * * In the social evolution, with the march of the arts and sciences and in the resultant effects upon organized society, it is quite intelligible that new conditions must arise in personal relations, which the rules of the common law, cast in the rigid mould of an earlier social status, were not designed to meet. It would be a reproach to equitable jurisprudence, if equity were powerless to extend the application of the principles of the common law, or of natural justice, in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social, or commercial conditions. * * * Security of person is as necessary as the security of property; and for that complete personal security, which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is to me an inconceivable one, that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity. * * * It seems to me that the principle, which is applicable, is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind. The writer, or the lecturer, has been protected in his right to a literary property in a letter, or a lecture, against its unauthorized publication; because it is property, to which the right of privacy attaches. I think that this plaintiff has the same property in the right to be protected in the use of her face for defendant's commercial purposes, as she would have, if they were

publishing her literary compositions. The right would be conceded if she had sat for her photograph; but if her face or her portrait has a value, the value is hers exclusively; until the use be granted away to the public."⁷⁰

The Georgia case was a suit for damages for the unauthorized publication of the plaintiff's picture in a life insurance advertisement. The court unanimously decided that the action was maintainable.⁷¹

70—*Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 561-565, 64 N. E. 442, 89 Am. St. Rep. 828.

71—*Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101. The court says: "The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. * * *

When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While of course the most flagrant violation of this right would be deprivation of life, yet life itself may be

spared and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor or violate public law or policy. The right of personal security is not fully accorded by allowing an individual to go through life in possession of all of his members and his body unmarred; nor is his right to personal liberty fully accorded by merely allowing him to remain out of jail or free from other physical restraints. The liberty which he derives from natural law, and which is recognized by municipal law, embraces far more than freedom from physical restraint. The term *liberty* is not to be so dwarfed, but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use

The right of privacy, conceding it to exist, is a purely personal one, that is it is a right of each individual to be let alone, or not to be dragged into publicity. One has no right of privacy with respect to his relatives, living or dead. Thus a parent may not enjoin the publication of the picture of his infant child.^{71a} And the widow, children or other relatives of a deceased person cannot enjoin the use of such person's likeness for advertising purposes,⁷² the erection of a statute of such deceased,⁷³ or the publication of a memoir of his life.⁷⁴

his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. One may wish to live a life of toil where his work is of a nature that keeps him constantly before the public gaze; while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual or the public has a right to arbitrarily take away from him his liberty. * * * The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state by the constitution of the United States

and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." pp. 194-197. In *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. S. 908, the publication of the plaintiff's picture was enjoined. And see *Mackenzie v. Mineral Spring Co.*, 27 Abb. N. C. 402; *Dockrell v. Dougall*, 78 L. T. R. 840. The Georgia case cites the following articles and notes on the subject: 4 Harvard Law Rev. 195; 36 Am. Law Rev. 614, 634-636; 34 Am. Law Reg. (N. S.) 134; 41 Ibid, 669; 1 Colo. Law Rev. 491; 2 Ibid, 437; 44 Alb. Law J. 428; 55 Cent. Law J. 123; 57 Ibid. 361; 12 Yale Law J. 35; 24 Nat. Corp. Rep. 709; 25 Ibid. 183, 415; 6 Law Notes, 79; 36 Chicago Legal News, 126; Case & Comment, July, 1902; North Am. Rev. Sept. 1902, p. 361; 22 Am. & Eng. Enc. L. (2nd Ed.) 1311; 89 Am. St. Rep. 844; 31 L. R. A. 283.

71a—*Murray v. Lithographic Co.*, 8 Misc. 36, 28 N. Y. S. 271.

72—*Atkinson v. Doherty*, 121 Mich. 372, 80 N. W. 285, 80 Am. St. Rep. 507.

73—*Schuyler v. Curtis*, 147 N. Y. 436, 42 N. E. 22, 49 Am. St. Rep. 671, 31 L. R. A. 236, revers-

ing S. C. in lower courts, which public character. A husband can-
held for the plaintiff. See Schuy- not maintain a suit for a libel on
ler *v.* Curtis, 15 N. Y. S. 787; S. C. his deceased wife; Wellman *v.*
64 Hun, 594, 19 N. Y. S. 264; S. Sun Printing & Pub. Co., 66 Hun,
C. 70 Hun, 598, 24 N. Y. S. 509. 331, 21 N. Y. S. 577. Nor a

74—Corliss *v.* Walker, 57 Fed. parent for a libel on a deceased
434; 64 Fed. 280, 31 L. R. A. 283. child. Bradt *v.* New Nonpareil
This case favors the existence of Co., 108 Ia. 449, 79 N. W. 122, 45
the right of privacy but the in- L. R. A. 681; Sorensen *v.* Bala-
junction was denied on the ban, 11 App. Div. 164, 32 N. Y.
ground that the deceased was a S. 91.

THE WRONGS OF SLANDER AND LIBEL.

The wrong of a malicious prosecution, which was considered in the preceding chapter, is akin to the wrongs known under the designation of slander and libel. Though it is injurious in that it is likely to subject the party to expense and trouble to make good his defense, it is also a most effective species of defamation, the defamatory matter being not only published, but made more formal, and apparently authoritative, by the machinery of the law being made use of for the purpose.

Slander and libel are different names for the same wrong accomplished in different ways. Slander is oral defamation published without legal excuse, and libel is defamation published by means of writing, printing, pictures, images, or anything that is the object of the sense of sight.¹

By defamation is understood a false publication, calculated to bring one into disrepute.²

Publication. In a legal sense, there is no wrong until the defamatory charge or representation is given to the world. This is done when it is put before one or more third persons; it is then said to be published.³ To say to a man's face any evil thing concerning him is no defamation; for though it may be

1—Mr. Townsend, in his *Treatise on Slander and Libel*, § 21, note, collects many definitions which have been given of these wrongs. "Libel is the malicious defamation of a person, made public by any printing, writing, effigy or pictorial representation." *Quinn v. Prudential Ins. Co.*, 116 Ia. 522, 525, 90 N. W. 349. "Libel is a false and unprivileged publication which exposes any person to hatred, contempt, ridicule, or

obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business." *Taylor v. Hearst*, 107 Cal. 262, 269, 40 Pac. 392.

2—*Hollenbeck v. Hall*, 103 Ia. 214, 72 N. W. 518, 64 Am. St. Rep. 175, 39 L. R. A. 734.

3—Publication must be shown. *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265; *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502. If a third person reads a libel or

annoying, aggravating, and possibly injurious to him in its effect upon his mind, and indirectly upon his business, still there is as yet no publication, and consequently nothing to affect the party's reputation. The reputation is not assailed, and cannot presumably be injured when the false charge is made only to the party himself.

*If the party who is thus falsely accused repeats it to [*226] others, by way of complaint or otherwise, it may then become public, but it is still no slander, because the publication is not made by the defamer. He has, it is true, uttered the charge, but he has not published it; and the responsibility is upon the accused himself, if, by his own act, he brings it before the public. So a defamatory writing is no libel so long as it remains in the possession of the composer, and is seen by no one else; but if he keeps such a paper in his possession, he must, at his peril, see that it does not fall into the hands of others; if it does, the publication is in law attributable to him as the party who originated the wrong, and was the means of its becoming injurious. But delivering the writing to the party himself is no more a publication of a libel than would be the addressing to him of defamatory words.⁴ And when the

hears it read, whether by design or inadvertence, there is a publication. *McLaughlin v. Schuellerbach*, 65 Ill. App. 50. A publication may be found though the evidence shows that the words were uttered in the hearing of only one person besides the parties and that person denies hearing them. *Loranger v. Loranger*, 115 Mich. 681, 74 N. W. 228. To allege merely that one "printed" a libel is not enough. *Sproul v. Pillsbury*, 72 Me. 20. "Publication, in the law of libel and slander, means the transmission of ideas and thoughts to the perception of a person, other than the parties to the suit." *Gambrill v.*

Schooley, 93 Md. 48, 60, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87.

4—*Spaits v. Poundstone*, 87 Ind. 522, 44 Am. Rep. 773; *Yousling v. Dare*, 122 Ia. 539, 98 N. W. 371; *Apolinaire v. Roca*, 43 La. Ann. 842, 9 So. 629; *Gambrill v. Schooley*, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87. Under an act making insulting words actionable, there is a sufficient publication if a letter with such words is sent to and read by the receiver. *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695; *Yousling v. Dare*, 122 Ia. 539, 98 N. W. 371. Whether it would be a publication of the

words are repeated to, or in the presence of a third person at the plaintiff's request, it is no publication.⁵ So where those in whose hearing a slander is uttered do not understand the meaning of the words and do not repeat them.⁶

Though the sending of a libelous letter by mail direct to the plaintiff, who receives and opens it, is no publication, yet if the sender has any reason to believe that other persons have authority to open and read his mail and it is opened and read by such a third person, or if the sender has reason to believe that the plaintiff is illiterate and that a third person will necessarily have to be called in, then in either case there is a publication by the sender.⁷ And some cases seem to hold there is a publication in such a case, whether or not the sender had reason for such belief.⁸ But it is no publication if a letter is opened and

libel if it is only delivered to the agent of the party, who is sent by his principal for it, *quere*. The decision in *Brunswick v. Harmer*, 14 Q. B. 185, is in the affirmative. In *Railroad Co. v. Delaney*, 102 Tenn. 289, 52 S. W. 151, 45 L. R. A. 600, the decision is in the negative. Compare *Haynes v. Leland*, 29 Me. 233; *Sutton v. Smith*, 13 Mo. 120. But sending a letter to the plaintiff's attorneys, which is read by them, is a publication. *Alabama, etc., Ry. Co. v. Brooks*, 69 Miss. 168, 13 So. 847, 30 Am. St. Rep. 528.

5—*Heller v. Howard*, 11 Ill. App. 554; *Shinglemeyer v. Wright*, 124 Mich. 231, 82 N. W. 887, 50 L. R. A. 129.

6—*Sullivan v. Sullivan*, 48 Ill. App. 435. Here the plaintiff was called a whore in the presence of her infant children who did not know what the word meant, and it was held no publication. But the uttering of the same charge

in the presence of a child six years old was held a publication in *Hammond v. Stewart*, 72 Ill. App. 512. That is no publication of a slander which is spoken in a foreign language which the hearer does not understand. *Kiene v. Ruff*, 1 Iowa, 482. The printing in a Dutch paper circulating in the United States a libellous article is a publication. *Steketee v. Kimm*, 48 Mich. 322.

7—*Rumney v. Worthley*, 186 Mass. 144, 71 N. E. 316.

8—*Allen v. Wortham*, 89 Ky. 485, 13 S. W. 73; *Seip v. Deshler*, 170 Pa. St. 334, 32 Atl. 1032; *Pullman v. Hill*, (1891) 11 Q. B. 524. If read by a third person to receiver who cannot read, no publication if sender did not know of receiver's ignorance. *State v. Syphrett*, 27 S. C. 29, 2 S. E. 624. Under an act making insulting words actionable, there is a sufficient publication if a letter with such words is sent to and read by

read by one having no legal right to do so.⁹ If a letter is purposely or carelessly directed in an ambiguous manner, so that it is uncertain for which of two persons it is intended, and it is opened by the wrong party, there is a publication.¹⁰ The mere fact of sending a libelous letter to the plaintiff unsealed is held not to prove publication.¹¹ So of sending a libel on a postal card.¹² But the contrary has also been held with respect to the postal card.¹³

If a libelous letter is dictated by the defendant to a stenographer and is then written out or printed by the latter, there is a publication, and any custom to conduct correspondence in that way, or necessity of doing so in the press of business, does not change the law.¹⁴ "Neither the prevalence of any business customs or methods, nor the pressure of business which compels resort to stenographic assistance, can make that legal

the receiver. *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695. Sending by mistake a letter to B intended to be sent to A, in whose hands it would be privileged is not actionable. *Tompson v. Dashwood*, L. R. 11 Q. B. D. 43.

9—*Wilcox v. Moon*, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760.

10—*Schmuck v. Hill*, 2 Neb. (unofficial) 79, 96 N. W. 158.

11—*Fry v. McCord Bros.*, 95 Tenn. 678, 33 S. W. 568.

12—*Steele v. Edwards*, 15 Ohio C. C. 52.

13—*Sadgrove v. Hole*, (1901) 2 Q. B. 1. But not if the plaintiff was not named or indicated, though the plaintiff was in fact intended.

14—*Gambrill v. Schooley*, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87; *State v. McIntire*, 115 N. C. 769, 20 S. E. 721; *Pullman v. Hill*, (1891) 1 Q. B. 524. In the latter case Lord Esher says: "I do not think that

the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libelous matter on their behalf, they will be liable for his acts. He ought to write such a letter himself, and to copy it himself, and, if he copies it into a book, he ought to keep the book in his own custody." p. 529. Compare *Boxsius v. Frères*, (1894) 1 Q. B. 842, where solicitors dictated a defamatory letter to the plaintiff in behalf of their client and the letter was copied out by the stenographer and copied in a book by another clerk, and it was held that there was no publication. The case is distinguished from the preceding in a way that is not very clear.

which is illegal, nor make that innocent which would otherwise be actionable. Nor can the fact that the stenographer is under contractual or moral obligation to regard all his employer's communications as confidential alter the reason of the matter."¹⁵

But if the defendant is a corporation and the course of business is for letters to be dictated by the manager to a stenographer and copied out by her and afterwards signed and mailed, it is held that there is no publication, as the two are fellow servants and the act of both is necessary to complete the letter, so that neither is a third party within the meaning of the law of libel.^{15a} If one gives a letter to a third party to make a letter press copy, there is a publication.¹⁶

If one writes a telegraphic message and delivers it to a telegraph company or its agent for transmission, it is a publication by the sender.¹⁷ And if the message is libelous on its face or is clearly susceptible of a libelous meaning and is transmitted by the agent and is written out and delivered to the sendee, there is a publication by the company.¹⁸

15—*Gambrill v. Schooley*, 93 Md. 48, 61, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87.

15a—*Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465, 53 N. Y. S. 1033.

16—*Pullman v. Hill*, (1891) 1 Q. B. 524.

17—*Monson v. Lathrop*, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

18—*Peterson v. Western Union Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302. The court says: "The defendant was a common carrier, and was bound to transmit all proper messages delivered to it for that purpose, but it was not bound to send indecent or libelous communications. Where a proffered message is not manifestly a libel, or susceptible of a libelous meaning, on its face, and is forwarded in good faith by the operator, the defendant cannot be held to have maliciously published a libel, although the message subsequently proves to be such in fact. In such case the operator cannot wait to consult a lawyer, or forward the message to the principal office for instructions. He must decide promptly, and forward the message without delay, if it is a proper one, and for any honest error of judgment in the premises the telegraph company cannot be held responsible. But where the message, on its face, is clearly susceptible of a libelous meaning, is not signed by any responsible person, and there is no reason to believe that it is a cipher message, and it is received under such circumstances as to warrant the jury in finding that

A communication between husband and wife, not in the presence of any third person, is not a publication,¹⁹ but there is a publication when the wife is slandered in the presence of her husband.²⁰ One who writes or signs a libelous article for publication,²¹ or gives information for that purpose, which is substantially embodied in an article and published,²² and all who procure, instigate or assist in the publication of a libel are liable.²³ Every separate and distinct publication of a libel is a distinct offense, as when it is published in different papers, or in the same paper on different days.²⁴ Where the defendant circulates a book containing a libel on the plaintiff it is a publication and he will be liable, unless he can show that he did not know of the libel and was not negligent in not knowing.²⁵ A beneficial association appointed a committee to investigate certain bills of the plaintiff. The committee made a printed report which was libelous and members helped themselves to the report from the secretary's desk. There was no custom or authority to make a printed report. At a subsequent meeting of

the operator, in sending the message, was negligent or wanting in good faith in the premises, the company may be held to have maliciously published the libel. A publication under such circumstances is not privileged." p. 23. Same case and same title, 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581. But unless the message is manifestly and necessarily defamatory on its face the company is bound to send it and is not responsible if it turns out to be libelous. *Nye v. Western Union Tel. Co.*, 104 Fed. 628.

19—*Sesler v. Montgomery*, 78 Cal. 486, 21 Pac. 185, 12 Am. St. Rep. 76, 3 L. R. A. 653.

20—*Linck v. Driscoll*, 13 Ind.

App. 279, 41 N. E. 463, 55 Am. St. Rep. 224.

21—*Union Associated Press v. Heath*, 49 App. Div. 247, 63 N. Y. S. 96; *Loibl v. Breidenbach*, 78 Wis. 49, 47 N. W. 15.

22—*Hazy v. Woitke*, 23 Colo. 556, 48 Pac. 1048; *Washington Gas Lt. Co. v. Lansden*, 9 App. D. C. 508; *State v. Osborne*, 54 Kan. 473, 38 Pac. 572; *Roberts v. Breckon*, 31 App. Div. 431, 52 N. Y. S. 638; *Wills v. Hardcastle*, 19 Pa. Supr. Ct. 525.

23—*Weston v. Weston*, 83 App. Div. 520, 82 N. Y. S. 351; *Willis v. Hardcastle*, 19 Pa. Supr. Ct. 525; *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75.

24—*Underwood v. Smith*, 93 Tenn. 687, 27 S. W. 1008, 42 Am. St. Rep. 946.

25—*Vizetelly v. Mudie's Select*

the association the report was adopted. It was held that there was no publication by the association.²⁶ A society voted to answer an article which had appeared concerning it and appropriated five dollars to pay for publishing it. The reply was written and published and proved to be libelous. The president of the society, who had nothing to do with the preparation of the article, and did not see it until published, afterwards signed an order, as president, for the payment of the five dollars; held not to make him liable.²⁷ Some further illustration will be found in the margin.²⁸

[*227] *Publication implies volition and actual or presumed wrongful intent. Therefore, if one who acts in a public or *quasi* public capacity, or as agent of another, receives a defamatory paper to carry and deliver to a third person, and he does so in good faith, and without knowledge of the contents, as an express agent might carry and deliver letters, or a servant, on his master's command, do the same, this is no publication by him, though it would be by the sender when delivery is made.²⁹ But in general, all persons in any manner instru-

Library, Limited, (1900) 2 Q. B. 170.

26—*Sénancour v. Societè la Prévoyance*, 146 Mass. 616, 16 N. E. 553.

27—*Russo v. Maresca*, 72 Conn. 51, 43 Atl. 552.

28—Sending a report by a corporation to its agents who employ men, that a servant has been discharged for stealing is a publication. *Bacon v. Mich. Cent. R. R. Co.*, 55 Mich. 224, 54 Am. Rep. 372. Compare, *De Senancour v. Soc. La Prévoyance*, 146 Mass. 616, 16 N. E. 553. To say to a woman "M has had intercourse with you," is held a publication in a suit by *M. Marble v. Chapin*, 132 Mass. 225. If a third person cuts from a paper defamatory words and sends them to

the betrothed of the person named, the one who caused their insertion is liable for such publication. *Zier v. Hoffin*, 33 Minn. 66, 53 Am. Rep. 9. See *Clay v. People*, 86 Ill. 147. But the original author of a slander is not liable for its unauthorized repetition by another. *Shurtleff v. Parker*, 130 Mass. 293; *Hastings v. Stetson*, 126 Mass. 329, 30 Am. Rep. 683. So where an "interview" in one paper is copied in another paper in another state. *Clifford v. Cochrane*, 10 Ill. App. 570. As to what is not a publication in case of expulsion of church member, see *Landis v. Campbell*, 79 Mo. 433.

29—*Townshend on Slander and Libel*, § 121. It is no publication by one who picks up and delivers

mental in making or procuring to be made the defamatory publication are jointly and severally responsible therefor. Therefore, one, in the course of whose business a libel is published by his agent, may be joined with the agent in an action for the publication, or may be proceeded against as principal, under the doctrine *respondeat superior*. But if the agent publishes an injurious charge without the assent of his principal, express or implied, the agent alone can be held accountable.³⁰ Where no express assent or authorization is made, the question whether assent is to be implied, is often a somewhat difficult one, and must be determined by the nature of the agency, the course of the business, etc. Thus, the assent of the proprietor of a business must be presumed to have been given to the reports, advertisements, etc., published by his agents in managing it, and to the letters written by them in carrying it on,³¹ but when the party to a suit places his case in the *hands of an attorney, he has not the ordinary supervision of a principal over his business, and cannot be understood as authorizing [*228] the case to be conducted in any other than a lawful and legitimate way; and he is therefore not responsible if the attorney shall insert defamatory matter in his pleadings, or abuse his privilege of speech in addressing the jury, unless his express assent is shown.³² Corporations are responsible for a

a sealed letter, the contents of which are unknown to him. *Fonville v. M'Nease*, Dudley, 303, 31 Am. Dec. 556. Every sale and delivery of a printed libel is a fresh publication. *Staub v. Van Benthuysen*, 36 La. Ann. 467. If a news vender does not know that a paper sold contains a libel, and his ignorance does not arise from negligence and he does not know, nor ought he to have known, that the paper is likely to contain libelous matter, he is not from the sale liable for a publication. *Emmens v. Pottle*, L. R. 16 Q. B. D. 354. See *Prescott v. Tousey*, 50 N. Y. Sup. Ct. 12.

30—*Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320; *Henry v. Pittsburg, etc.*, R. R. Co., 139 Pa. St. 289, 21 Atl. 157.

31—*Philadelphia, etc.*, R. R. Co. *v. Quigley*, 21 How. 202; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672. Not for libelous letters written outside of the scope of his agency. *South. Expr. Co. v. Fitzner*, 59 Miss. 581, 42 Am. Rep. 372. And see cases pp. *138, *139, *supra*.

32—*Hardin v. Cumstock*, 2 A. K. Marsh. 480, 12 Am. Dec. 427.

libel by their officers, agents or servants on the same conditions as other principals are.³³ All partners are responsible for a libel or slander committed by one in course of the partnership business,³⁴ otherwise if there is no participation express or implied.³⁵ The husband is liable jointly with the wife for slander by the latter.³⁶

The publisher of a newspaper must, at his peril, see that the supervision of his business is such as to exclude all libellous publications, and he is responsible, though one is made without his knowledge, and notwithstanding stringent regulations made by himself, which, if observed, would have prevented it.³⁷ And the

33—*American Casualty Co. v. Lea*, 56 Ark. 539, 20 S. W. 416; *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320; *Fogg v. Boston, etc., R. R. Co.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583; *Howland v. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. 656; *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S. W. 668; *Hoboken Printing & Pub. Co. v. Kahn*, 59 N. J. L. 218, 35 Atl. 1053, 59 Am. St. Rep. 585; *Clifford v. Press Pub. Co.*, 78 App. Div. 79, 79 N. Y. S. 767; *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280; *St. Louis, etc., Ry. Co. v. McArthur*, 31 Tex. Civ. App. 205, 72 S. W. 66; *Sun Life Ins. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692. Where a member of a voluntary association slandered the plaintiff, for which the association suspended him, the action must be against the individual and not the association. *Gilbert v. Crystal Fountain Lodge*, 80 Ga. 284, 4 S. E. 905, 12 Am. St. Rep. 255.

34—*Atlantic Glass Co. v. Paulk*,

83 Ala. 404, 3 So. 800; *Haney Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073.

35—*Hendricks v. Middlebrooks Co.*, 118 Ga. 131, 44 S. E. 835. One partner in the furniture business is not liable for another's independent act in putting a libelous placard in front of their store. *Woodling v. Knickerbocker*, 31 Minn. 268.

36—*Taylor v. Pullen*, 152 Mo. 434, 53 S. W. 1086; *Ridgway v. Speilman*, 20 Pa. Co. Ct. 596; *ante*, pp. *132-*135.

37—*Perrett v. Times Newspaper*, 25 La. Ann. 170; *Buckley v. Knapp*, 48 Mo. 152; *Storey v. Wallace*, 60 Ill. 51; *Commonwealth v. Morgan*, 107 Mass. 199; *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575; *Same Case*, 38 Mich. 10; *Andres v. Wells*, 7 Johns. 260; *Dunn v. Hall*, 1 Ind. 345; *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392; *Dunn v. Hearst*, 139 Cal. 239, 73 Pac. 138; *International Fraternal Alliance v. Mallalien*, 87 Md. 97, 39 Atl. 93; *Haines v. Schultz*, 50 N. J. L. 481, 14 Atl. 488; *Clifford v. Press Pub. Co.*, 78 App. Div. 79, 79 N. Y. S.

same is true of the general manager³⁸ or managing editor.³⁹ It is immaterial that the proprietor has turned over the entire management of his paper to others and resides abroad.⁴⁰ This liability is not planted on the ground merely of the duty of the principal to see that his business is managed in good faith and with proper care, but it corresponds to the liability of one who,

767. "A corporation engaged in publishing a newspaper obviously must act by selected agents. Its directors or managers cannot formally pass on each publication or determine what is to be admitted therein. Such determination is necessarily committed to its agents. In making such determination they are acting within the scope of their employment. The intent with which they publish must be imputed to the corporation which employs them to make the publication of the newspaper. If the intent is malicious, the corporation must be liable therefor as it is for other tortious acts of its agents done within the scope of their authority and for the purposes for which the corporation was created and the agents were employed." *Hoboken Printing & Pub. Co. v. Kahn*, 59 N. J. L. 218, 35 Atl. 1053, 59 Am. St. Rep. 585. One partner in business of publishing a newspaper is liable for the express malice of the other. *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528. So for that of an agent. *Bruce v. Reed*, 104 Pa. St. 408, 49 Am. Rep. 586. *Contra*, *Eviston v. Cramer*, 57 Wis. 570; *Scripps v. Reilly*, 38 Mich. 10, if due care has been exercised in his retention and selection. See, also, *Haines v. Schuytz*, 50 N. J. L. 481, 14 Atl. 488, See *Mecabe*

v. Jones, 10 Daly, 222, as to liability of holder of majority of the stock of a company who exercises some supervision over the articles printed. If a puffing article written by plaintiff is published at his request, an unintentional mistake of the printer does not make the publication a malicious libel. *Sullings v. Shakespeare*, 46 Mich. 408, 41 Am. Rep. 166.

38—*Danville Press Co. v. Harrison*, 99 Ill. App. 244.

39—"The law is well settled that the managing editor of a newspaper is equally liable with the proprietor and publisher for the consequences, in a civil action for the publication of a libelous article; and this is so whether he knows of the publication or not, for it is his business to know, and mere want of knowledge constitutes no defense." *Smith v. Utley*, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620. But the officers and stockholders of a corporation engaged in publishing a newspaper are not responsible for a libelous article therein merely because they are such officers or stockholders. They are liable only in case they have advised, aided or assisted in the publication. *Pfister v. Sentinel Co.*, 108 Wis. 572, 84 N. W. 887.

40—*Crane v. Bennett*, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722.

having brought upon his premises something extremely liable to inflict great and irreparable injury, is required at all events to make good the injury resulting from the inadequacy of his precautions.⁴¹

Words Actionable *per se*. Certain publications are said to be actionable *per se*. By this is meant that an action will lie for *making them without proof of actual injury, because [*229] their necessary or natural and proximate consequence would be to cause injury to the person of whom they are spoken, and therefore injury is to be presumed.⁴² In the case of certain other publications no such presumption can be made, because observation does not justify a like conclusion. Therefore, in such cases, the publications are only actionable on averment and proof that injury which the law can notice actually followed as a natural and proximate consequence.

Classification of Slanderous Words. In the recent case of *Pollard v. Lyon*, spoken words, as a cause of action, are classified by Mr. Justice Clifford as follows: "1. Words falsely spoken of a person which impute to the party the commission

41—Quoted and approved in *Long v. Tribune Printing Co.*, 107 Mich. 207, 65 N. W. 108. A journalist cannot protect himself from the consequences of publishing a libel by assurances of its truthfulness, and by a contract of indemnity from the writer. *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260. But if he publishes an article, supposing it to be innocent, as upon its face it seems to be, he may be excused. See *Smith v. Ashley*, 11 Met. 367, 45 Am. Dec. 216.

42—*Trimble v. Tautlinger*, 104 Ia. 665, 69 N. W. 1045; *Confidential Nat. Bank v. Bowdre Bros.*, 92 Tenn. 723, 23 S. W. 131; *Townshend on Slander and Libel*, § 146. Proof of special damage in such

case is inadmissible. *Boldt v. Budwig*, 19 Neb. 739. The law implies malice in the absence of justification. *Belck v. Belck*, 97 Ind. 73. Whether words are slanderous *per se* depends not on the law of the state where they were spoken, but of that where the act is stated to have taken place. *Dufresne v. Weise*, 46 Wis. 290. In Louisiana the distinction between words actionable *per se* and those actionable only where special damage is alleged, is rejected, and only the actual damages proved can be recovered in either case. *Shotorno v. Fourichon*, 4 So. Rep. 71; *Tarleton v. Lagarde*, 46 La. Ann. 1368, 16 So. 180, 49 Am. St. Rep. 353, 26 L. R. A. 325.

of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. 2. Words falsely spoken of a person which impute that the party is infected with some contagious disease, where if the charge is true, it would exclude the party from society. 3. Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. 5. Defamatory words falsely spoken of a person which, though not in themselves actionable, occasion the party special damage.”⁴³

The first four of these classes are of words actionable *per se*. The fifth embraces cases which are actionable only when the special damage is averred.

Brief notice will be taken of these several classes.

1. Words which impute to the Party an Indictable Offense.

It is agreed on all hands that it is not always *prima facie* actionable to impute to one an act which is subject to indictment and punishment. Importance in the law of [*230] defamation is attached to the inherent nature of the indictable act, and also to the punishment which the law assigns to it. In the leading case of *Brooker v. Coffin*, the following was given as the test: “In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable;”⁴⁴ and this test has

43—Pollard v. Lyon, 91 U. S. Rep. 225, 226.

44—Brooker v. Coffin, 5 Johns. 188, 4 Am. Dec. 337; Bigelow, Lead. Cases on Torts, 77. Where an offense is charged which, if proved, may subject the party to a punishment, not ignominious, but which brings disgrace upon the party falsely accused, such

accusation is actionable. “The defamatory effect of words charging a disgraceful offense is substantially the same whatever the form of criminal procedure under which the offense is punished.” Kelley v. Flaherty, 16 R. I. 234, 14 Atl. 876, 27 Am. St. Rep. 739. If the crime charged involves moral turpitude the pun-

been accepted and applied so often and so generally that it may now be accepted as settled law.⁴⁵

ishment need not be infamous and imprisonment in the house of correction sufficient. *Posnett v. Marble*, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162.

45—See *Pollard v. Lyon*, 91 U. S. Rep. 225; Anonymous, 60 N. Y. 263, 19 Am. Rep. 174; *McKee v. Wilson*, 87 N. C. 300; *Graybill v. De Young*, 140 Cal. 323, 73 Pac. 1067; *Kenney v. Ill. State Journal Co.*, 64 Ill. App. 39; *Fredrickson v. Johnson*, 60 Minn. 337, 62 N. W. 388; *Pokrok Zapader Pub. Co. v. Zizkoosky*, 42 Neb. 64, 60 N. W. 358; *Collyer v. Collyer*, 50 Hun. 422, 3 N. Y. S. 310; *Davis v. Carey*, 141 Pa. St. 314, 21 Atl. 633. In the last case it is said the word *infamous* in the rule is to be taken, not in its technical, but in its popular, sense as meaning degrading. In *Miller v. Parish*, 8 Pick. 384, 385, PARKER, C. J., says: "It is objected that a false and malicious charge of fornication against a female will not sustain an action of slander, because fornication is not a crime at common law, and is not punishable by statute with ignominious punishment. We do not think that the objection is valid; for whenever an offense is charged which, if proved, may subject the party to a punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable." In England it is held that words which impute any crime, though it be not indictable, are action-

able *per se*. *Wood v. Beavan*, L. R. 11 Q. B. D. 609.

The above rule approved in *Cox v. Bunker, Morris*, 269. In *Perdue v. Burnett, Minor*, (Ala.) 138, the words, "You have altered the marks of four of my hogs," were held in themselves actionable, as they charge an act involving moral turpitude, and an indictable offense, although the punishment may not be infamous.

They must convey a charge of some act criminal in itself, and indictable as such, and subjecting the party to an infamous punishment or some offense involving moral turpitude. *McCuen v. Ludlum*, 17 N. J. 12.

In *Gosling v. Morgan*, 32 Pa. St. 273, 275, the undisturbed authority of the leading cases of *Shaffer v. Kintzer*, 1 Binn. 537; *McClury v. Ross*, 5 Binn. 218, and *Andreas v. Koppenheaver*, 3 S. & R. 255, establishes the principle that "words spoken of a private person are only actionable when they contain a plain imputation not merely of some indictable offense, but one of an infamous character, or subject to an infamous and disgraceful punishment." *S. P. Klumph v. Dunn*, 66 Pa. St. 141; *Hoag v. Hatch*, 23 Conn. 585, 590. It is not sufficient that they impute to a person merely the violation of a penal or criminal law, but that they charge him with a crime, which involves moral turpitude, or would subject him to an infamous punishment.

To the same effect are *Dottarer v. Bushey*, 16 Pa. St. 204, 209;

*In the application of this test results have been [*231] worked out in some cases which cannot be said to be entirely satisfactory. Thus, it has been held in Pennsylvania that to charge one with having made a libel is slanderous; the punishment at the common law having been infamous, and the offense itself, in its higher degree, being infamous.⁴⁶ And in

Stitzell v. Reynolds, 67 Pa. St. 54, 57.

In *Ranger v. Goodrich*, 17 Wis. 78, 80, per PAINE J.: "It is a general rule that words charging another with a crime involving moral turpitude punishable by law are actionable."

In *Montgomery v. Deeley*, 3 Wis. 709, 712, the court quote *Brooker v. Coffin*, 5 Johnson, 188, 4 Am. Dec. 337, recognizing the same test.

In *Filber v. Dautermann*, 26 Wis. 518, 520, the court say: "This is certainly 'a crime involving moral turpitude,' and subjects the party guilty of its commission to 'an infamous punishment,'" citing above *Wisconsin cases*, and *Benaway v. Conyne*, 3 Chand. (Wis.) 214.

Hollingsworth v. Shaw, 19 Ohio St. 430, 433, 2 Am. Rep. 411: "These authorities, and the general current of decisions, warrant us in saying that to render words actionable *per se*, on the ground that they impute criminality to the plaintiff, they must, 1st, be such as charge him with an indictable offense; and, 2d, the offense charged must involve a high degree of moral turpitude, or subject the offender to infamous punishment."

In *Davis v. Brown*, 27 Ohio St. 326, 328, "The words must import

a charge of an indictable offense, involving moral turpitude or infamous punishment."

Same rule in *Dial v. Holter*, 6 Ohio St. 228, 241, and in *Alfele v. Wright*, 17 Ohio St. 238, 241, 93 Am. Rep. 615.

See, further, *Perdue v. Burnett*, Minor, (Ala.) 138; *Howard v. Stephenson*, 2 Const. Rep. (S. C.) 408; *Gage v. Shelton*, 3 Rich. 242.

Some cases go further, and seem to require that, in order to render the charge actionable *per se*, the act imputed shall not only be subject to an infamous punishment, but also involve moral turpitude. Thus, in *Redway v. Gray*, 31 Vt. 292, 298, the court, through POLAND, J., say: "We think that in addition to the offense charged being punished corporeally, it must impute moral turpitude, and the true reason why assaults, and breaches of the peace, and violations of the liquor law, are not such offenses as make words charging them actionable, is because they do not necessarily, and in a legal sense, imply moral turpitude. The offense of larceny does necessarily imply it, and there is no distinction between grand and petty larceny in this respect." See, also, *Smith v. Smith*, 2 Sneed, 473.

46—*Andres v. Koppenheaver*, 3 S. & R. 255.

New York, to charge one with removing landmarks is held slanderous, on the ground that the offense involves moral [*232] turpitude.⁴⁷ On the other *hand, whatever the moral turpitude involved in the act, it is generally agreed that it is not actionable *per se* to charge it if it is not indictable, even though it be punishable as disorderly conduct.⁴⁸ Therefore, to charge a female with being a common prostitute is held

47—*Young v. Miller*, 3 Hill, 21. See *Todd v. Rough*, 10 S. & R. 18; *Beck v. Stitzel*, 21 Pa. St. 522; *Hoag v. Hatch*, 23 Conn. 585; *Townshend on Slander and Libel*, § 155, and cases cited. The grade of crime—whether felony or misdemeanor—is immaterial. *Young v. Miller*, 3 Hill, 24, and cases cited. *Kenney v. Ill. State Journal Co.*, 64 Ill. App. 39. In Massachusetts it has been held actionable *per se* to charge a woman with drunkenness; that offense being subject to disgraceful punishment. *Brown v. Nickerson*, 5 Gray, 1. To accuse one of committing an assault and battery is not *per se* slanderous. *Billings v. Wing*, 7 Vt. 439.

Where dogs are the subject of larceny it is actionable *per se* to charge one with stealing a dog. *Harrington v. Miles*, 11 Kan. 480, 15 Am. Rep. 355.

It is not actionable *per se* to say: "You have took my pocket book and have it in your pocket." *Christal v. Craig*, 80 Mo. 367. "You will steal." *Bays v. Hunt*, 60 Ia. 251. To charge with sodomy is not, in Ohio. *Melvin v. Weiant*, 36 Ohio St. 184, 38 Am. Rep. 572. With being a cheat. *Pollock v. Hastings*, 88 Ind. 248. With buying liquor when selling it is a crime. *Sterling v. Jugen-*

heimer, 69 Ia. 210. It is to say: "He tried to steal a dog but could not." *Berdeaux v. Davis*, 58 Ala. 611. "He stole my coin." *Wilson v. McCrory*, 86 Ind. 170. So to charge one with poisoning stock. *Lemons v. Wells*, 78 Ky. 117. To charge one with being an abortionist. *De Pew v. Robinson*, 95 Ind. 109. With public indecency. *Sellers v. Jenkins*, 97 Ind. 430. With writing an obscene communication. *Halstead v. Nelson*, 36 Hun, 149. With getting money by false pretences. *Lafollett v. McCarthy*, 18 Ill. App. 87. With "slow poisoning" her husband. *Campbell v. Campbell*, 54 Wis. 90. With furnishing watered milk where the act is a crime involving moral turpitude and infamous punishment. *Geary v. Bennett*, 53 Wis. 444. See *Brooks v. Harison*, 91 N. Y. 83. See also *Bacon v. Mich. Cen. R. R. Co.*, 55 Mich. 224, 54 Am. Rep. 372; *West v. Hanrahan*, 28 Minn. 385; *Boogher v. Knapp*, 76 Mo. 457. To call one a "felon editor" after the person has undergone his sentence, is not justified by showing the conviction. *Leyman v. Latimer*, L. R. 3 Ex. D. 352.

48—See *Seery v. Viall*, 16 R. I. 517, 17 Atl. 552; *Lodge v. O'Toole*, 20 R. I. 405, 39 Atl. 752.

not actionable without averment of special damage, though it is difficult to conceive that any other charge can be more likely to injure, and the conduct itself is punishable as vagrancy.⁴⁹ But words imputing unchastity are held actionable *per se* in some states.⁵⁰ And so in states wherein adultery and fornication are made criminal offenses by statute.⁵¹

49—Brooker *v.* Coffin, 5 Johns. 188, 4 Am. Dec. 337; S. C. Bigelow, Lead. Cas. on Torts, 77. See Keiler *v.* Lessford, 2 Cranch, 190; Pollard *v.* Lyon, 91 U. S. Rep. 225; Bissell *v.* Cornell, 24 Wend. 354; Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420; Wilson *v.* Goit, 17 N. Y. 442; Stanfield *v.* Boyer, 6 Har. & J. 248; Woodbury *v.* Thompson, 3 N. H. 194; Boyd *v.* Brent, 3 Brev. 241; Underhill *v.* Welton, 32 Vt. 40; Castleberry *v.* Kelly, 26 Ga. 606; W. *v.* L., 2 Nott & McCord, 204; Berry *v.* Carter, 4 Stew. & Port. 387, 24 Am. Dec. 762; Elliott *v.* Ailsberry, 2 Bibb. 473, 5 Am. Dec. 631; Linney *v.* Maton, 13 Texas, 449; McQueen *v.* Fulgham, 27 Texas, 463; Douglas *v.* Douglas, 4 Idaho 293, 38 Pac. 934; Lidlle *v.* Wallen, 17 Mont. 150, 42 Pac. 289. In Massachusetts this rule is rejected, and the imputation of unchastity to a female is held actionable *per se*. Miller *v.* Parish, 8 Pick. 384; Ruthertford *v.* Paddock, 180 Mass. 289, 62 N. E. 381, 91 Am. St. Rep. 282. But fornication is there indictable and punishable by fine, and in case the fine is not paid, by imprisonment. And see, Frisbie *v.* Fowler, 2 Conn. 707; Sexton *v.* Todd, Wright, 317; Wilson *v.* Runyan, Wright, 651; Malone *v.* Stewart, 15 Ohio 319, 45 Am. Dec. 577. It is not slander *per se* to say of a lady teacher that she

"was in the habit of entertaining gentlemen callers at all hours of the night." Hemmens *v.* Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440.

50—Kedrolivansky *v.* Niebaum, 70 Cal. 216; Page *v.* Merwin, 54 Conn. 426; Reitan *v.* Goebel, 33 Minn. 151; Williams *v.* McManus, 38 La. Ann. 161, 58 Am. Rep. 171; Barnett *v.* Ward, 36 Ohio St. 107, 38 Am. Rep. 561; Hitchcock *v.* Caruthers, 82 Cal. 523, 23 Pac. 48; Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533; Wimer *v.* Allbaugh, 78 Ia. 79, 42 N. W. 587, 16 Am. Rep. 422; Cushing *v.* Hederman, 117 Ia. 637, 91 N. W. 940, 94 Am. St. Rep. 320; Johnson *v.* Forse, 80 Minn. 315, 83 N. W. 182; Hendrickson *v.* Sullivan, 28 Neb. 329, 44 N. W. 448; Kelley *v.* Flaherty, 16 R. I. 234, 14 Atl. 876, 27 Am. St. Rep. 739.

51—Mayer *v.* Schleichter, 29 Wis. 646; Cox *v.* Bunker, Morris, 269; Haynes *v.* Ritchey, 30 Iowa 76, 6 Am. Rep. 642; Zeff *v.* Jennings, 61 Tex. 458, but see Ross *v.* Fitch, 58 Tex. 148; Iles *v.* Swank, 202 Ill. 453, 66 N. E. 1042; Jacksonville Journal Co. *v.* Beymer, 42 Ill. App. 443; Burke *v.* Stewart, 81 Ill. App. 506; Iles *v.* Swank, 105 Ill. App. 9; Binford *v.* Young, 115 Ind. 174, 16 N. E. 142; Freeman *v.* Sanderson, 123 Ind. 264, 24 N. E. 239; Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E.

Words charging a person with theft,⁵² burglary,⁵³ arson,⁵⁴

551, 15 Am. St. Rep. 400; *Hibner v. Fleetwood*, 19 Ind. App. 421, 49 N. E. 607; *Stutsman v. Stutsman*, 32 Ind. App. 73, 66 N. E. 773; *Lynons v. Stratton*, 102 Ky. 317, 43 S. W. 446; *Nicholson v. Merritt*, 109 Ky. 369, 59 S. W. 25; *Bowden v. Bailes*, 101 N. C. 612, 8 S. E. 342; *Davis v. Sladden*, 17 Ore. 259, 21 Pac. 140; *Hutcher v. Range*, 98 Tex. 85. In the following States to impute unchastity to a female is actionable by statutes: Alabama, Maryland, North Carolina, South Carolina, Kentucky, Missouri, Michigan, Illinois, Indiana, New York, Oregon. It is actionable to charge a married woman with eloping. *Smith v. Matthews*, 6 Misc. 162, 27 N. Y. S. 120; or to say that she "has run off with another man," *Jacksonville Journal Co. v. Beymer*, 42 Ill. App. 443; or that she is a prostitute, *Davis v. Sladden*, 17 Ore. 259, 21 Pac. 140. So to charge an unmarried woman with being pregnant, *Ransom v. McCauley*, 140 Ill. 626, 31 N. E. 119; or that she is living with a man as his wife, *Indianapolis Jour. Newspaper Co. v. Pugh*, 6 Ind. App. 510, 33 N. E. 991; *Mooney v. Bennett*, 44 App. Div. 423, 60 N. Y. S. 1103; *Mooney v. N. Y. News Pub. Co.*, 48 App. Div. 271, 62 N. Y. S. 781. To say of a woman, "She is an old cat," meaning a prostitute, is actionable *Barr v. Birkner*, 44 Neb. 197, 62 N. W. 494. So if these words: "You are not a decent woman; you do not keep a respectable house," *Loranger v. Loranger*, 115 Mich. 681, 74 N. W. 228. That she is a woman of ill repute is not. *Burke v. Stewart*,

81 Ill. App. 506. Calling a woman a *bitch* is not actionable *per se*. *Roby v. Murphy*, 27 Ill. App. 394; *Claypool v. Claypool*, 56 Ill. App. 17; *Craig v. Pyles*, 101 Ky. 593, 39 S. W. 33; *Blake v. Smith*, 19 R. I. 476, 34 Atl. 995. So held, though it was alleged in the narr. that at the place where spoken the word was commonly understood to mean whore or prostitute and that the defendant was aware of this fact and meant so to charge. *Robertson v. Edelstein*, 104 Wis. 440, 80 N. W. 724. But in Pennsylvania it is held that the word may mean a lewd woman and that whether so understood is for the jury. *Stoner v. Erisman*, 206 Pa. St. 600, 56 Atl. 77. Where adultery and fornication are crimes it is actionable to charge a man with "keeping a woman," *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725; so to charge a married man with infidelity, *Bishop v. Journal Newspaper Co.*, 168 Mass. 327, 47 N. E. 119.

The wrongful act of a third party, induced by the slander, will not support an action where the words are not actionable *per se*. *Vicars v. Wilcocks*, 8 East. 1. As to what will constitute special injury, see *Moody v. Baker*, 5 Cow. 413; *Pettibone v. Simpson*, 66 Barb. 492; *Beach v. Ranney*, 2 Hill, 309; *Davies v. Solomon*, L. R. 7 Q. B. 112.

52—*Gaines v. Belding*, 56 Ark. 100, 19 S. W. 236; *Smullen v. Phillips*, 92 Cal. 408, 28 Pac. 442; *Harris v. Zazone*, 93 Cal. 59, 28 Pac. 845; *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786; *Roberts v. Ramsey*, 86 Ga. 432, 12 S. E. 644;

perjury,⁵⁵ murder or attempt to murder, are actionable *per se*.⁵⁶ It is held to be actionable *per se* to charge a man with being a swindler,⁵⁷ or a blackmailer,⁵⁸ or the greatest rum-seller in town,⁵⁹ or with unlawfully interfering with the mails,⁶⁰ or with keeping a house of ill fame.⁶¹ So to charge that, a franchise was obtained from certain officers by the use of boodle.⁶² Where drunkenness is a statutory offense it is actionable *per se* to charge one therewith,⁶³ but otherwise if it is only punishable by ordinance.⁶⁴ Where the promulgation of certain anarchistic sentiments is made a felony, it is actionable *per se* to call a man an anarchist.⁶⁵

Stumer v. Pitchman, 124 Ill. 250, 15 N. E. 757; Lehrer v. Elmore, 100 Ky. 56, 37 S. W. 292; Savoie v. Scanlan, 43 La. Ann. 967, 9 So. 916, 26 Am. St. Rep. 200; Fatjo v. Seidel, 109 La. 699, 33 So. 737; Williams v. McKee, '98 Tenn. 139, 38 S. W. 730; Darling v. Clement, 69 Vt. 292, 37 Atl. 779.

53—Childers v. Mercury P. & P. Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

54—Clugstone v. Garretson, 103 Cal. 441, 37 Pac. 469; Cox v. Strickland, 101 Ga. 482, 28 S. E. 655; Taylor v. Ellington, 46 La. Ann. 371, 51 So. 499.

55—Stallings v. Whittaker, 55 Ark. 494, 18 S. W. 829; Huffer v. Miller, 74 Md. 454, 22 Atl. 205; Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119.

56—Republican Pub. Co. v. Miner, 12 Colo. 77, 20 Pac. 345; Furr v. Speed, 74 Miss. 423, 21 So. 562. In Thomas v. Blasdale, 147 Mass. 438, 18 N. E. 214, the defendant made certain charges against the plaintiff with respect to the death of his wife. These words were held actionable: "He knows how she came to her death; he killed her; he is to blame for

her death; there was foul play there." And these not: "He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else; he is to blame for it."

57—Schultz v. Huebner, 108 Mich. 274, 66 N. W. 57.

58—Hess v. Sparks, 44 Kan. 465, 24 Pac. 979, 21 Am. St. Rep. 300; Palmer v. Mahn, 120 Fed. 737, 57 C. C. A. 41.

59—Davis v. Starrett, 97 Me. 568, 55 Atl. 516.

60—Witts v. Jones, 13 App. D. C. 482.

61—Coloney v. Farrow, 5 App. D. C. 607, 39 N. Y. S. 460; Knapp v. Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765; Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162.

62—Boehmer v. Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822, 34 Am. St. Rep. 318.

63—Morgan v. Kennedy 62 Minn. 348, 64 N. W. 912, 54 Am. St. Rep. 647, 30 L. R. A. 521.

64—Seery v. Viall, 16 R. I. 517, 17 Atl. 552; Lodge v. O'Toole, 20 R. I. 405, 39 Atl. 752.

65—Von Gerichten v. Seitz, 94 App. Div. 130, 87 N. Y. S. 968.

It is not actionable to accuse a man of an intent to commit a crime, as to say of a person: "He is going to start a house of ill fame."⁶⁶ The charge of a merely immoral offense which is not criminal, is not actionable without special damages result.⁶⁷ Such charges fall within the category of mere vituperation and abuse.⁶⁸ "If the words convey an imputation of crime, they are actionable in whatever mode their meaning may be expressed; they may be by way of insinuation, interrogation, by ironical praise, or by any form of speech understood by the hearers."⁶⁹

[*233] *To charge one with having sworn falsely, without connecting the charge with any pending proceedings in

66—*Fanning v. Chase*, 17 R. I. 388, 22 Atl. 275, 33 Am. St. Rep. 878, 13 L. R. A. 134. The court says: "We do not think, however, that the words relied on in the declaration are defamatory within the legal meaning of that term. To defame another by language, is to harm or destroy his good fame or reputation, or to disgrace or culluminate him. In order to have this evil effect, however, it is evident that the language used concerning him must relate to his conduct or character as they now are, or have been in the past, and not be the mere opinion of the speaker, as to what they will be at some indefinite period in the future. In other words, that language which amounts to a mere assertion or opinion as to what will be the future conduct or character of another is not actionable; but that it is only actionable when it relates to what the person now is or has been in the past, or to what he is doing or attempting to do, or has done or attempted to do in the past; that is, when it relates to something which is actual, in-

stead of something which is merely imaginary or conjectural." pp. 390-1.

67—That plaintiff has been arrested in a bastardy proceeding and has paid \$100 to settle it: *Erwin v. Dezell*, N. Y. S. 784. That plaintiff sold his vote at an election, there being no penalty prescribed. *Doyle v. Kirby*, 184 Mass. 409, 68 N. E. 843. That he is a drummer for a whore house. *Mudd v. Rogers*, 102 Ky. 280, 43 S. W. 255. That he belongs to a band of robbers. *Story v. Jones*, 52 Ill. App. 112. That he procured another to cast more than one vote at an election, such election not being authorized by law. *Shepherd v. Piper*, 98 Me. 384, 57 Atl. 84. And see *Thorp v. Nolan*, 27 Ky. L. R. 326, 84 S. W. 1168.

68—*Foster v. Bone*, 38 Ill. App. 613; *Robertson v. Edelstein*, 104 Wis. 440, 80 N. W. 724.

69—*Haines v. Campbell*, 74 Md. 158, 163, 21 Atl. 702, 28 Am. St. Rep. 240. To same effect: *Gorham v. Ives*, 2 Wend. 534; *Gibson v. Williams*, 4 Wend. 320; *Dotterer v. Bushey*, 16 Pa. St. 204.

court, is not actionable, because, though the taking of a false oath may be disgraceful, it is not an indictable offense, unless taken under such circumstances as would make it perjury.⁷⁰ And, however positive may be the charge, if it is accompanied with words which qualify the meaning, and show to the bystanders that the act imputed is not criminal, this is no slander, since the charge, taken together, does not convey to the minds of those who hear it an imputation of criminal conduct. Thus, it would not be slanderous *per se* to say: "He is a thief: he has stolen my land;" land not being the subject of larceny, and one part of the charge being relieved of its criminal character by the other part.⁷²

70—Ward v. Clark, 2 Johns. 10, 3 Am. Dec. 383, and cases cited. Schmidt v. Witherick, 29 Minn. 156. Thus to say of one that he has made a false affidavit is not sufficient. Casselman v. Winship, 3 Dak. 292, 19 N. W. 412. But to say of one, "He has sworn to a damned lie, and I will put him through for it," is held actionable, as implying that the false oath was taken under such circumstances as made it punishable. Crone v. Angell, 14 Mich. 340; Brown v. Hanson, 53 Ga. 632; Gilman v. Lowell, 8 Wend. 573; Sherwood v. Chase, 11 Wend. 38; Coons v. Robinson, 3 Barb. 625; Spooner v. Keeler, 51 N. Y. 527. Words are actionable which imply a false oath in a judicial proceeding, although no such proceeding existed. Bricker v. Potts, 12 Pa. St. 200; or the person did not testify. Holt v. Turpin, 78 Ky. 433. But to render words actionable *per se* they need not necessarily bear a criminal import. If they would be understood so to do in the ordinary use of language it is enough. Stroebl v. Whitney,

31 Minn. 384. See Campbell v. Campbell, 54 Wis. 90.

72—Stitzell v. Reynolds, 67 Pa. St. 54; Brown v. Myers, 40 Ohio St. 99; Ogden v. Riley, 14 N. J. 186; Underhill v. Welton, 32 Vt. 40; McCaleb v. Smith, 22 Iowa 242; Edgerly v. Swain, 32 N. H. 478; Ayers v. Grider, 15 Ill. 37; Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573; Trabue v. Mays, 3 Dana, 138; Williams v. Hill, 19 Wend. 305; Dexter v. Taber, 12 Johns. 239; Crone v. Angell, 14 Mich. 340; McGilvray v. Sprungelt, 68 Ill. App. 275; Harrison v. Manship, 120 Ind. 43, 22 N. E. 87; Divens v. Meredith, 147 Ind. 693, 47 N. E. 143; Bridgeman v. Armer, 57 Mo. App. 528; Barnes v. Crawford, 115 N. C. 76, 20 S. E. 386; Egan v. Semrod, 113 Wis. 84, 88 N. W. 906. See Phillips v. Barber, 7 Wend. 439; Parmer v. Anderson, 33 Ala. 78; Pegram v. Styron, 1 Bayley, 595; Perry v. Man, 1 R. I. 263; Miller v. Johnson, 79 Ill. 58; Wright v. Lindsay, 20 Ala. 428; Blanchard v. Fisk, 2 N. H. 398; Cock v. Weatherby, 13 Miss. 333; Allen v. Hillman, 12

[*234] *It has been sometimes supposed that the reason for holding an imputation of an indictable offense slanderous was, that it imperiled the party and exposed him to the risk of prosecution and punishment; but the authorities are not consistent with this view. The charge of criminal conduct for which punishment has been inflicted, or which has been pardoned, or a prosecution for which is barred by the statute of limitations, will support an action under corresponding circumstances to those which support one where the charge, if true, would still subject the party to punishment.⁷³ It is not, therefore, the danger that might follow from the charge, but the disgrace of the scandal that constitutes the injury. And to say of one: "He is a perjured villain," is actionable to the same extent as to charge him with perjury in a particular suit; the word perjured necessarily implying the commission by him of a crime.⁷⁴

Pick. 101. Where a statute makes it larceny to steal anything, parcel of the realty, it is actionable to charge the plaintiff with stealing screen doors. *Halsey v. Stillman*, 48 Ill. App. 413. If from the language it appears that the words were not intended to charge a crime, but were mere abuse, they are not slanderous *per se*. *Fawsett v. Clark*, 48 Md. 494. But if the words impute a crime, they are, though the charge could not be true; nor does the disbelief of the hearers alter the rule, unless there was an express or implied qualification showing that no crime was intended to be charged. *Rea v. Harrington*, 58 Vt. 181. If words actionable in themselves are spoken of a transaction which is not a crime and of which the hearers have full knowledge, they are not actionable. *Pollock v. Hastings*, 88 Ind. 248. The test is, does the speaker

intend by the words to make the charge, and do the hearers understand him to so intend, and is the charge as made false. *Shull v. Raymond*, 23 Minn. 66. See *Trimble v. Foster*, 87 Mo. 49, 56 Am. Rep. 440.

73—*Carpenter v. Tarrant*, Cas. Temp. Hardw. 339; *Smith v. Stewart*, 5 Pa. St. 372; *Holley v. Burgess*, 9 Ala. 728; *Van Ankin v. Westfall*, 14 Johns. 233; *Krebs v. Oliver*, 12 Gray 239; *Shipp v. McCraw*, 3 Murph. 463, 9 Am. Dec. 611. A child too young to be punishable for a crime may nevertheless maintain an action for slander in charging him with it. *Stewart v. Howe*, 17 Ill. 71.

74—*Sabin v. Angell*, 46 Vt. 740, charge that one is a thief. *Noonan v. Orton*, 32 Wis. 106, charge of perjury. See, also, *Fisher v. Rotureau*, 2 McCord, 189; *Hogg v. Wilson*, 1 Nott & McC. 216; *Little v. Barlow*, 26 Ga. 423, 71 Am. Dec.

***2. Words which impute to the Party a Contagious or [*235] Infectious Disease.** The reason for holding such words actionable is, that they tend to exclude the party from society; and therefore the charge should impute the existence of the disease at the time.⁷⁵ What diseases would be embraced within this rule is not certain, but it is probable that at the present day only those which are contagious or infectious, and which are also usually brought upon one by disreputable practices: and the list would perhaps be limited to venereal diseases.⁷⁶ It has been held actionable to charge one with having a loathsome disease.⁷⁷ So of leprosy.⁷⁸ But consumption is not within the rule.⁷⁹

3. Words Damaging as respects Office or Profession. This class of cases, in order to be *prima facie* actionable, must clearly appear to be spoken of the party in respect to his office, profession or employment, and if the words counted on do not by themselves show this, the declaration must contain the necessary averments to connect them.⁸⁰ An illustration of such a slander is when a professional man is charged with general professional

219; Pierson v. Steortz, Morris, 136; McKee v. Ingalls, 5 Ill. 30; Van Akin v. Caler, 48 Barb. 58; Davis v. Johnston, 2 Bailey, 579; Kennedy v. Gifford, 19 Wend. 296. It has often been decided that to charge one with having been a convict is actionable *per se*. See Smith v. Stewart, 5 Pa. St. 372, where the previous cases are collected. Also, Indianapolis Sun v. Horrell, 53 Ind. 527; Morrissey v. Providence Tel. Pub. Co., 19 R. I. 124, 32 Atl. 19. To say of one, "I know enough that he has done to send him to the penitentiary," is actionable *per se*. Johnson v. Shields, 25 N. J. 116. To say of one, "He was once accused of stealing a horse; he sued the accusers, and at the trial a verdict was brought in for the defend-

ants," is equivalent to a charge that he is guilty of larceny. Johnson v. St. Louis Despatch Co., 65 Mo. 539, 27 Am. Rep. 293.

75—Taylor v. Hall, 2 Stra. 1189; Williams v. Holdredge, 22 Barb. 396; Carslake v. Mapledoram, 2 T. R. 473; Nichols v. Gray, 2 Ind. 82; Bruce v. Soule, 69 Me. 502.

76—See Watson v. McCarthy, 2 Kelly, 57; Irons v. Field, 9 R. I. 216; Nichols v. Guy, 2 Ind. 82; Kaucher v. Blinn, 29 Ohio St. 62; McDonald v. Nugent, 122 Ia. 651, 98 N. W. 506.

77—Monks v. Monks, 118 Ind. 238, 20 N. E. 744.

78—Simpson v. Press Pub. Co., 33 Wis. 228, 67 N. Y. S. 401.

79—Rade v. Press Pub. Co., 37 Miss. 254, 75 N. Y. S. 298.

80—Ayre v. Craven, 2 Ad. & El. 7.

ignorance or incompetency.⁸¹ It is actionable to accuse a lawyer of charging outrageous and excessive fees,⁸² or to impute to him dishonesty in his profession.⁸³ But not to say that he is slow in paying his bills,⁸⁴ or that he has moved his office to his house to save expense.⁸⁵ To call a physician a quack is actionable *per se*.⁸⁶ A catholic priest said in his pulpit, concerning the plaintiff who was a physician and had been divorced and married again, that this in effect excommunicated him from the church, and should debar him from employment as a physician by members of the parish and from social functions, and

81—Camp v. Martin, 23 Conn. 86. See cases of slanders of physicians; Ayre v. Craven, 2 Ad. & El. 7; Jones v. Diver, 22 Ind. 184; Sumner v. Utley, 7 Conn. 258; Camp v. Martin, 23 Conn. 86; Seacor v. Harris, 18 Barb. 425; Carroll v. White, 33 Barb. 615; Rice v. Cottrel, 5 R. I. 340; DePew v. Robinson, 95 Ind. 109; Turner v. Hearst, 115 Cal. 394, 47 Pac. 129; McDonald v. Lord, 27 Ill. App. 111; Ritchie v. Widdemer, 59 N. J. L. 290, 35 Atl. 825; Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. 457; Mattice v. Wilcox, 147 N. Y. 624, 42 N. E. 270; Bornmann v. Star Co., 174 N. Y. 212, 66 N. E. 723; Krug v. Pitass, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317. So though the words relate to but a single case if they import so gross disregard of duty as necessarily to injure him. Prat v. Pioneer Press Co., 35 Minn. 251; Lynde v. Johnson, 39 Hun, 12; see *Gauvreau v. Superior Pub. Co.*, 62 Wis. 403. An article referring to one solely as coroner is not basis for an action alleging injury to one as physician. Purdy v. Rochester &c., Co., 96 N. Y. 372, 48 Am. Rep. 632. Cases of slan-

ders of lawyers; Rich v. Cavanaugh, 2 Pa. St. 187; Goodenow v. Tappan, 1 Ohio 60; Garr v. Selden, 6 Barb. 416; Chipman v. Cook, 2 Tyler 456. See Ludwig v. Cramer, 53 Wis. 193; Hetherington v. Sterry, 28 Kan. 426, 42 Am. Rep. 169; Barr v. Moore, 87 Pa. St. 385. Cases of slanders of clergymen; McMillan v. Birch, 1 Binn. 178, 2 Am. Dec. 426; Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 203; Hartley v. Herring, 8 T. R. 130; Gallwey v. Marshall, 24 Eng. L. & E. 463; Chaddock v. Briggs, 13 Mass. 248, 7 Am. Dec. 137.

82—Ivey v. Pioneer Sav. & L. Co., 113 Ala. 349, 21 So. 531; Mosnat v. Snyder, 105 Ia. 500, 75 N. W. 356.

83—Mains v. Whiting, 87 Mich. 172, 49 N. W. 559; Wallace v. Jameson, 179 Pa. St. 98, 36 Atl. 142.

84—McDermott v. Union Credit Co., 76 Minn. 84, 78 N. W. 967, 79 N. W. 673.

85—Stewart v. Minn. Tribune Co., 40 Minn. 101, 41 N. W. 457, 12 Am. St. Rep. 696.

86—Hargan v. Purdy, 93 Ky. 424, 20 S. W. 432; Elmergreen v. Horn, 115 Wis. 385, 91 N. W. 973.

that he would not go as a priest where the plaintiff was employed as a physician. The words were held actionable as injurious to the plaintiff in his profession.⁸⁷ So it is actionable to call a clergyman an unscrupulous liar,⁸⁸ or to charge him with the use of profane language,⁸⁹ or to charge a teacher with disgraceful conduct towards his pupils.⁹⁰ Words, though not defamatory, if false, and made for the purpose of injuring one in his profession, and which naturally and probably would have that effect and do in fact have that effect, are actionable.⁹¹ To make words spoken of a professional man actionable, in the sense now under consideration, they must be spoken of him in his professional character. "It is not enough that the language disparages him generally, or, that his general reputation is thereby affected, or that the words used tend to injure him in his profession."⁹²

Words are actionable *per se* which impute to an official dishonesty or corruption in his office,⁹³ or general misconduct therein,⁹⁴ or willful neglect of official duty.⁹⁵ The defendant in a

87—*Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 467, 8 L. R. A. 524.

88—*Monson v. Lathrop*, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

89—*Potter v. N. Y. Evening Journal Pub. Co.*, 68 App. Div. 95, 74 N. Y. S. 317. Or that he is devoid of moral principles. *Coles v. Thompson*, 7 Tex. Civ. App. 666, S. W. 46. A case of libel.

90—*Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624. So to charge a clergyman with incontinence. *Gallwey v. Marshall*, 9 Exch. 294. Or with misappropriating collections and being unfit to be a minister. *Franklin v. Browne*, 67 Ga. 272. Or a school superintendent with official corruption, (Here a libel). *Hartford v. State*, 96 Ind. 461; see *Larabee v. Minn. Tribune Co.*, 36

Minn. 141. Or the architect of a public building with mental unsoundness. *Clifford v. Cochrane*, 10 Ill. App. 570. Or a temperance organizer with being a seducer and hypocrite. *Finch v. Vifquain*, 11 Neb. 280.

91—*Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 467, 8 L. R. A. 524.

92—*Divens v. Meredith*, 147 Ind. 693, 696, 47 N. E. 143.

93—*Wofford v. Meeks*, 129 Ala. 349, 30 So. 625, 87 Am. St. Rep. 66, 55 L. R. A. 214; *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216; *Randall v. Evening News Assn.*, 79 Mich. 266, 44 N. W. 783, 7 L. R. A. 309.

94—*Augusta Evening News v. Radford*, 91 Ga. 494, 17 S. E. 612, 44 Am. St. Rep. 53, 20 L. R. A. 533; *Bourreseau v. Detroit Even-*

public meeting to consider the matter of a local bill pending in the legislature, said of the plaintiff, who was a representative: "I am sorry that the representative from this district has had a change of heart; sometimes a change of heart comes from the pocket." It was held that the words would not bear the meaning that the plaintiff had changed his views from corrupt motives, or for money paid or promised, and that "in order to be defamatory of one in respect to his public office, the spoken words must go at least so far as to impute to him some incapacity or lack of due qualification to fill the position, or some positive past misconduct which will injuriously affect him in it,

ing Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320; *Sharpe v. Larson*, 67 Minn. 428, 70 N. W. 1, 554; *Martin v. Paine*, 69 Minn. 482, 72 N. W. 450; *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811; *Nehrling v. Herold Co.*, 112 Wis. 558, 88 N. W. 614.

95—*Hay v. Reid*, 85 Mich. 296, 48 N. W. 507; *Scougale v. Sweet*, 124 Mich. 311, 82 N. W. 1061. The following are further illustration: Charge that the postmaster would rob the mail; *Craig v. Brown*, 5 Blackf. 44; charge that the chief engineer of the fire department was drunk at a fire; *Gottbehuet v. Hubachek*, 36 Wis. 515; statement of a justice of the peace, in connection with his office, that he is a rascal, villain and liar; *King v. Chaundler*, 2 Raym. 1363. And, see, *Lindsey v. Smith*, 7 Johns. 359; *Gove v. Blethen*, 21 Minn. 80, 18 Am. Rep. 380. But the rule does not apply if at the time the words were spoken the party had ceased to hold the office. *Gibbs v. Prices*, *Styles*, 231; *Collins v. Mellen*, *Cro. Car.* 282; *Bellamy v. Burch*, 16 M. & W. 590; *Forward*

v. Adams, 7 Wend. 204; *Edwards v. Howell*, 10 Ired. 211; *Allen v. Hillman*, 12 Pick. 101. But see *Sharpe v. Larson*, 67 Minn. 428, 70 N. W. 1, 554. So to assail the character or integrity of a judge. *Robbins v. Treadway*, 2 J. J. Marsh. 540, 19 Am. Dec. 152; *Hook v. Hackney*, 16 S. & R. 385. Or of a justice of the peace. *Oram v. Franklin*, 5 Blackf. 42; *Spiering v. Andrae*, 45 Wis. 330. Or of a circuit court commissioner. *Lansing v. Carpenter*, 9 Wis. 540. To charge a certificated master mariner with drunkenness while in command of his vessel at sea, was held actionable in *Irwin v. Brandwood*, 2 Hurl. & Colt. 960. See also *Danville Democrat Pub. Co. v. McClure*, 86 Ill. App. 432; *Prosser v. Callis*, 117 Ind. 105, 19 N. E. 735; *State v. Keenan*, 111 Ia. 286, 82 N. W. 792; *Kilgour v. Evening Star Co.*, 96 Md. 16, 53 Atl. 716; *O'Brien v. Times Pub. Co.*, 21 R. I. 256, 43 Atl. 101; *Colulla v. Kerr*, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; *Houston Printing Co. v. Moulden*, 15 Tex. Civ. App. 574, 41 S. W. 381.

or the holding of principles which are hostile to the maintenance of the government.”⁹⁶

***4. Words which tend to Injure one in his Business or Trade.** [*236] To bring a case within the fourth class mentioned, the imputation must be such as is calculated to affect the party prejudicially in the business in which he is engaged. Therefore, a false charge that in respect to one person might be slanderous, if made in respect to another would support no action. The reason would be that in the one case it would be almost certainly injurious, while in the other no presumption of injury would arise. Thus, if it be said of a day laborer: “He is a bankrupt,” the remark, so far as his business is concerned, is perfectly harmless, while if the same remark were made of a merchant, or of any one to whose business a good financial credit was indispensable, the natural and probable tendency would be to inflict an injury which would be serious and might be disastrous.⁹⁷ The merchant is therefore slandered when his pecuniary credit is impugned; the day laborer is not.

*The rules which protect persons against slanders in [*237] their business are nevertheless applicable to all kinds and all grades of business; to the day laborer and the servant as much as to the banker, the broker or the merchant.⁹⁸ And while men engaged in rival business may puff their own wares, and will be excused for any extravagance of statement, so long as they do not unjustly assail the business of their rivals, yet they have no more liberty in making unfounded and injurious imputations against rivals to the prejudice of their business than they have upon other persons, but must keep within the

96—*Sillars v. Collier*, 151 Mass. 50, 53, 23 N. E. 723, 6 L. R. A. 680. following cases relating to other callings illustrate the rule: *Phil-*

97—*Brown v. Smith*, 13 C. B. 599; *Mott v. Comstock*, 7 Cow. 654; *Sewall v. Catlin*, 3 Wend. 291; *Ostrom v. Calkins*, 5 Wend. 263; *Nelson v. Borchenius*, 52 Ill. 236. To call a drover a bankrupt is actionable. *Lewis v. Hawley*, 2 Day, 495, 2 Am. Dec. 121. The following cases relating to other callings illustrate the rule: *Phil-*
lips v. Hæfer, 1 Pa. St. 62, 44 Am. Dec. 111; *Burtch v. Nickerson*, 17 Johns. 217, 8 Am. Dec. 390; *Fitzgerald v. Redfield*, 51 Barb. 484; *Orr v. Skofield*, 56 Me. 483; *Fowles v. Bowen*, 30 N. Y. 20.
 98—*Terry v. Hooper*, 1 Lev. 115.

same limits of truth and fairness.⁹⁹ It is legitimate for a manufacturer or dealer to proclaim that his own goods are superior to those of his rival, though this may cause loss of trade to the latter.¹

Any false and disparaging statement concerning one in his trade, occupation or calling is actionable in itself, and the person concerning whom such a statement is made, although he is

99—*Young v. Macroe*, 32 L. J. Q. B. 6, S. C. 3 Best & Smith, 264, was a case where a mineral oil merchant published a chemist's report which reflected unfavorably upon the oil sold by a rival merchant. It was held that the action would not lie, provided the report was the result of a *bona fide* analysis of the oils, and contained nothing known to the defendant as false at the time of publication. In *Boynton v. Remington*, 3 Allen, 397, it was held no libel upon a dealer in coal, in L., who had advertised genuine Franklin coal for sale, to publish the following advertisement: "Caution: The subscribers, the only shippers of the true and original Franklin coal, notice that other coal dealers in L. than our agent J. S., advertise Franklin coal. We take this method of cautioning the public against buying of other parties than J. S., if they hope to get the genuine article, as we have neither sold nor shipped any Franklin coal to any party in L. except our agent, J. S." Of this BIGELOW, C. J., says: "This was within the privilege of fair dealing, and cannot be tortured into a disparagement of the plaintiff's character." But in *Harman v. Delaney*, 2 Sta. 898, it was held actionable to indulge

in general reflections upon the character of a party and his conduct of his business. So in *Weiss v. Whittemore*, 28 Mich. 266, it was held actionable *per se* to publish of an agent for the Steinway pianos, but who had formerly been agent for both that and the Knabe pianos, that he had in every instance while holding such double agency, recommended the Knabe piano as the best, and advised his customers to buy that, as being superior in every respect to the other. See, also, *Western Counties Manure Co. v. Lawes, &c., Co.*, L. R. 9 Exch. 218; S. C. 10 Moak, 391.

1—*Hubbuck & Sons v. Wilkinson*, (1899) 1 Q. B. 86. "The truth is that the defendant's circular when attentively read comes to no more than a statement that the defendants' white zinc is equal to, and, indeed, somewhat better, than the plaintiffs'. Such a statement, even if untrue and the cause of loss to the plaintiffs, is not a cause of action. Moreover, an allegation that the statement was made maliciously is not enough to convert what is *prima facie* a lawful into *prima facie* an unlawful statement. It is not unlawful to say that one's own goods are better than other people's." p. 91.

unable to show that he has sustained damage or loss, is nevertheless entitled to recover.² Any statement calculated to injuriously affect the credit or financial standing of a merchant or person engaged in trade is actionable.³ "The law is sensitive in regard to charges made against the business of a merchant. It will not permit anyone to make false charges against a merchant's credit or his financial standing."⁴ Such are charges that he is a bankrupt, or has assigned, or secured his bank, or given a chattel mortgage, or been attached.⁵ But a false state-

- 2—*Lovejoy v. Whitcomb*, 174 Mass. 586, 55 N. E. 322. To same effect: *Gaither v. Advertiser Co.*, 102 Ala. 458, 14 So. 788; *Holmes v. Clisby*, 118 Ga. 820, 45 S. E. 684; *Harkness v. Chicago Daily News Co.*, 102 Ill. App. 162; *Fred v. Traylor*, 115 Ky. 94, 72 S. W. 768; *Haney Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073; *Hankel v. Schaub*, 94 Mich. 542, 54 N. W. 293; *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; *Price v. Conway*, 134 Pa. St. 340, 19 Atl. 687, 19 Am. St. Rep. 704, 8 L. R. A. 193; *Holland v. Flick*, 212 Pa. St. 201; *Cooley v. Galyon*, 109 Tenn. 1, 70 S. W. 607, 97 Am. St. Rep. 823, 60 L. R. A. 139; *Darling v. Clement*, 69 Vt. 292, 37 Atl. 779; *Robinson v. Eau Claire Book &c., Co.*, 110 Wis. 369, 85 N. W. 983; *Ratcliff v. Evans*, (1892) 2 Q. B. 524. The following was held not to be libelous: "Caution: An opinion of Shaw knit hosiery should not be formed from the navy blue stockings advertised as of 'first quality' by Messrs. S. W. Boynton & Co., at 12½ cts., since we sold that firm at less than 10 cents a pair some lots which were damaged in the dye-house." *Boynton v. Shaw Stocking Co.*, 97 Mass. 219.
- 3—*Simons v. Burnham*, 102 Mich. 189, 60 N. W. 476.
- 4—*Brown v. Holton*, 109 Ga. 431, 433, 34 S. E. 717.
- 5—*McKenzie v. Denver Times*, 3 Colo. App. 554, 34 Pac. 577; *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138; *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S. W. 668; *Bee Pub. Co. v. World Pub. Co.*, 59 Neb. 713, 82 N. W. 28; *Smith v. Bradstreet Co.*, 63 S. C. 525, 41 S. E. 763; *Continental Nat. Bank v. Bowdre Bros.*, 92 Tenn. 723, 23 S. W. 131. But see *School v. Bradstreet Co.*, 85 Ia. 551, 52 N. W. 500. It is not actionable to say of a dealer that his goods are bad or inferior to those dealt in by another, where no deceit or wrong is imputed to him. *Boynton v. Shaw, &c., Co.*, 146 Mass. 219, 15 N. E. 507; *Tobias v. Harland*, 4 Wend. 537. Otherwise to charge a tradesman in print with counterfeiting genuine articles and their trade-marks. *Steketee v. Kimm*, 48 Mich. 322. To say of a hotel keeper that "he kept no accommodations, and that one could not get a decent

ment that a judgment for \$4,000 had been rendered against one engaged in the manufacture and sale of brick, was held not actionable, as such fact alone did not necessarily involve any default in the payment of a debt or lack of credit or financial standing.⁶ But if the statement shows that the judgment has been entered on a demand note, it is otherwise.⁷ Any charge of fraud or dishonesty, spoken of one in connection with his business, whereby his character in such business may be injuriously affected, is actionable.⁸ A charge that an undertaker's bill was

meal or bed if he tried," is slanderous *per se*. *Trimmer v. Hiscock*, 27 Hun, 364. In *Riding v. Smith*, 1 Exch. Div. 91; S. C. 16 Moak, 547, an action by a trader was sustained for words charging his wife, who was his assistant in business, with having committed adultery on the premises, special damage being proved. POLLOCK, B.: "The courts have at all times been extremely careful as to verbal slander; but where you find that the nature of the words is such that damages would naturally follow from their being uttered, and that damage has arisen, then there is a cause of action. * * The words were spoken on a public occasion, when the clergyman was about to read himself in, in order that he might become the incumbent of the parish, and the defendant, in the presence of four persons at least, uttered the words with regard to his conduct with the wife of the plaintiff." Compare *Lovejoy v. Whitcomb*, 174 Mass. 586, 55 N. E. 322.

6—*Woodruff v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555. The court says: "The recovery of a judgment does not necessarily import conceded de-

fault in payment of a debt. It is a matter of frequent observation that controversies, arising apparently out of an honest difference of opinion, go into the courts for determination. Litigation also not infrequently comes from causes in which is involved no personal credit or default. There is nothing in the defendant's report to indicate that the judgment was produced by any cause prejudicial to the credit of the plaintiff, and there is no presumption in that respect in aid of the action. There was nothing for the consideration of the jury bearing upon the question whether the publication was libelous; and we think the trial court properly held, as matter of law, that it was not such *per se*." p. 222.

7—*Hayes v. Press Co.*, 127 Pa. St. 642, 18 Atl. 331, 14 Am. St. Rep. 874, 5 L. R. A. 643.

8—*Orr v. Skoffeld*, 56 Me. 483; *Backus v. Richardson*, 5 Johns. 476; *Noeninger v. Vogt*, 88 Mo. 589; *International Fraternal Alliance v. Mallalien*, 87 Md. 97, 39 Atl. 93; *Cassavoy v. Pattison*, 93 App. Div. 370, 87 N. Y. S. 658; *Meas v. Johnson*, 185 Pa. St. 12, 39 Atl. 562; *Morse v. Times-Republican Print. Co.*, 124 Ia. 707, 100

unjust was held a libel *per se*, as imputing dishonesty and unfair dealing in business.⁹ So of a charge that one lacks business capacity.¹⁰ So of words imputing insanity in connection with one's business, as to say of a bank teller that he became mentally deranged from overwork and that while in that condition he made statements injurious to the bank.¹¹

To falsely blacklist a person for not paying his debts is actionable.¹² So of a statement that the plaintiff was discharged from the defendant's employment for reprehensible conduct.¹³ But where the reason assigned was "a general careless manner of attending to our business," it was held not actionable, as it did not charge unskillfulness or incompetency in the business.¹⁴ A corporation may sue for defamatory state-

N. W. 867; *Ukman v. Daily Record Co.*, 189 Mo. 378, 88 S. W. 60.

9—*Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701.

10—*Gaither v. Advertiser Co.*, 102 Ala. 458, 14 So. 788. To say of a business man that he has had one or more unsatisfactory fires is not actionable *per se*. *Goll v. Delesderniers*, 26 Misc. 549, 57 N. Y. S. 475. So of a charge of cutting prices. *Willis v. Eclipse Mfg. Co.*, 81 App. Div. 591, 81 N. Y. S. 359; *Norfolk & W. Steamboat Co. v. Davis*, 12 App. D. C. 306.

11—*Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214. "The publication was, we think, defamatory in a legal sense, although it imputed no crime and subjected the plaintiff to no disgrace, reproach or obloquy, for the reason that its tendency was to subject the plaintiff to temporal loss and deprive him of those advantages and opportunities, as a member of the community, which

are open to those who have both a sound mind and a sound body." p. 207.

12—*Western Union Tel. Co. v. Pritchett*, 108 Ga. 411, 34 S. E. 216; *Western v. Barnicoat*, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; *Traynor v. Sielaff*, 62 Minn. 420, 64 N. W. 915; *Muetze v. Tuteur*, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86. Compare *Ulery v. Chicago Live Stock Exchange*, 54 Ill. App. 233.

13—*Tonini v. Cevasco*, 114 Cal. 266, 46 Pac. 103.

14—*Ratzel v. N. Y. News Pub. Co.*, 67 App. Div. 598, 73 N. Y. S. 849. So, of a notice that the plaintiff is no longer in the employ of the defendant and has no connection with its business. *Ibid*. But it was actionable where this was added to such a notice. "Our friends and customers will kindly note the above and give Mr. Warner no recognition on our account." *Warner v. Clark*, 45 La. Ann. 863, 13 So. 203, 21 L. R. A.

ments calculated to injure its business.¹⁵ A charge that half the ties in the plaintiff's road-bed are rotten, was held to be such a statement.¹⁶ It is actionable to charge a butcher with selling diseased meat.¹⁷ So to charge that the wares of a manufacturer are a humbug and worthless.¹⁸

The refusal of a bank to pay the plaintiff's check to a third party, though having sufficient funds of the plaintiff to meet it, is in the nature of a slander upon the plaintiff's credit and business, and renders the bank liable for substantial damages, though no actual damages are proven, when the plaintiff is engaged in trade or business.¹⁹ In *Schaffner v. Ehrman* the court

502. And see *Railroad Co. v. Delaney*, 102 Tenn. 289, 52 S. W. 151, 45 L. R. A. 600.

15—*Morrison-Jewell Filtration Co. v. Lingane*, 19 R. I. 316, 33 Atl. 452; *Journal Printing Co. v. MacLean*, 23 Ont. App. Rep. 324; *South Hetton Coal Co. v. N. E. News Ass.*, (1894) 1 Q. B. 133. A corporation cannot maintain an action for the slander of one of its officers or stockholders, which merely charges him with a crime, but might if the slander was spoken of the officer or stockholder in relation to the business of the company. *Brayton v. Cleveland Special Police Co.*, 63 Ohio St. 83, 57 N. E. 1085, 52 L. R. A. 525.

16—*Ohio, &c., Ry. Co. v. Press Pub. Co.*, 48 Fed. 206.

17—*Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 157; *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266; *Leitz v. Hohman*, 16 Pa. Supr. Ct. 276. So to charge a butcher with selling veal taken from an unborn calf. *Singer v. Bender*, 64 Wis. 169. But derogatory words as to quality of articles furnished by a caterer are not. *Dooling v. Budget Pub. Co.*, 144 Mass. 258, 59 Am. Rep. 83.

18—*Inland Printer Co. v. Economical Half Tone Supply Co.*, 99 Ill. App. 8.

19—*Schaffner v. Ehrman*, 139 Ill. 109, 28 N. E. 917, 32 Am. St. Rep. 192, 15 L. R. A. 134; *Schaffner v. Ehrman*, 139 Ill. 670, 28 N. E. 917; *Hann v. Drovers Nat. Bank*, 92 Ill. App. 611; *Svensdsen v. State Bank*, 64 Minn. 40, 65 N. W. 1086, 58 Am. St. Rep. 522, 31 L. R. A. 552; *Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190; *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 18 Atl. 632, 17 Am. St. Rep. 779; *Callahan v. Bank*, 69 S. C. 374, 48 S. E. 293; *Wood v. Am. Nat. Bank*, 100 Va. 306, 40 S. E. 931; *Marzetti v. Williams*, 1 B. & Ad. 415; *Rolins v. Steward*, 14 C. B. 595. See *Roe v. Bank of Versailles*, 167 Mo. 406, 67 S. W. 303; *Eichner v. Bowery Bank*, 24 App. Div. 63, 48 N. Y. S. 978. Where a notary, who was an employe of a bank, falsely and maliciously protested a draft on the plaintiff sent to the bank for collection, he was held liable. *May v. Jones*, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637. The premature protest of a note was held not actionable in *Hirshfield*

says: "It is well understood that in an action for slander by a person for the speaking of slanderous words of him in the way of his trade, the fact that he is a trader, takes the place of special damages. To return a check marked: 'Refused for want of funds,' to the holder, especially through a clearing house, certainly tends to bring the drawer of that check into disrepute as a person engaged in mercantile business, and it needs no argument to show that a single refusal might often, and frequently does, bring ruin upon a business man; and yet it is no more possible in either case to prove special or actual damages than it is for one charged with the commission of a crime to show specifically in what manner he has been injured.'" ²⁰

***5. Words Not Actionable per se.** The fifth class of [*238] cases embraces all those in which the untruthful statement is not deemed in law to be necessarily of a damaging character, but which can be and is shown to have been damaging in the particular case, by reason of special circumstances which are set out in the declaration.²¹ Thus, if one say of another: "He is a rogue," the law will not imply a resulting injury; but if it be shown that in consequence of the imputation he was discharged from an employment, or was refused employment, the special injury is thus made to appear.²² So, al-

v. Fort Worth Nat. Bank, 83 Tex. 452, 18 S. W. 743, 29 Am. St. Rep. 660, 15 L. R. A. 639. Where the defendant sent the plaintiff's note, which had been satisfied in full, to a bank for collection or protest, and the same was protested, the defendant was held liable. *State Mutual Life, &c., Ass. v. Baldwin*, 116 Ga. 855, 43 S. E. 262. See *Am. Nat. Bank v. Morey*, 113 Ky. 857, 69 S. W. 759, 101 Am. St. Rep. 379.

20—*Schaffner v. Ehrman*, 139 Ill. 109, 113, 28 N. E. 917, 32 Am. St. Rep. 192, 15 L. R. A. 134, which last has a note on the question.

21—*Ford v. Lamb*, 116 Ga. 655, 42 S. E. 998; *Mudd v. Rogers*, 102 Ky. 280, 43 S. W. 255; *Karger v. Rich*, 81 Wis. 177, 51 N. W. 424.

22—*Oakley v. Farrington*, 1 Johns. Cas. 129, 1 Am. Dec. 107. So where the terms "cheat and swindler" are used. *Odiorne v. Bacon*, 6 Cush. 185. If words are not slanderous *per se*, plaintiff must show what they were intended and understood to mean, and the testimony of the hearers as to how they understood them is admissible. *Nidever v. Hall*, 67 Cal. 79.

though to say of a female that she is unchaste is generally held not actionable where unchastity is not made a punishable crime, yet if the woman can show that because of the imputation she lost a contemplated marriage, or suffered in any manner a pecuniary loss she is entitled to legal redress.²³ It is [*239] not thought necessary to attempt any enumeration *of the cases in which such actions are sustained, as it could be to little purpose in illustrating a doctrine so general. The injury must be pecuniary in its nature, but it is immaterial whether it be great or small, except as the amount of the recovery will depend upon it.²⁴ The special damage must be specifically set forth by means of facts alleged.²⁵ The general claim of damages in the *ad damnum* clause is not enough.²⁶ It is held in Rhode Island that if words are not defamatory in their nature slander or libel will not lie, though they are false and malicious and produce special damage. The court says: "We think that it

23—*Shepherd v. Wakeman*, 1 Sid. 79; *Reston v. Promfeict*, Cro. Eliz. 639; *Davis v. Gardiner*, 4 Co. 16; *Davies v. Solomon*, L. R. 7 Q. B. 112; *Moody v. Baker*, 5 Cowen, 351; *Olmstead v. Miller*, 1 Wend. 510; *Williams v. Hill*, 19 Wend. 305; *Pettibone v. Simpson*, 66 Barb. 492; *Underhill v. Welton*, 32 Vt. 40.

24—*Beach v. Ranney*, 2 Hill, 309; *Bassil v. Elmore*, 65 Barb. 627; S. C. 48 N. Y. 561, and the cases cited above. It was once held in New York that mere mental distress, physical illness and inability to labor occasioned by the aspersion, were sufficient special damage to sustain an action. *Bradt v. Towsley*, 13 Wend. 253; *Fuller v. Fenner*, 16 Barb. 333. But these cases are overruled. *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Wilson v. Goit*, 17 N. Y. 442. It is not a bar to an action for slander that the

speaker was drunk when he spoke, nor that he has subsequently apologized. *Williams v. McManus*, 38 La. Ann. 161, 58 Am. Rep. 171. But no action lies for words spoken in the heat of a quarrel brought on by plaintiff if his reputation is not affected by them. *Johnston v. Barrett*, 36 La. Ann. 320; *Bloom v. Crescioni*, 109 La. 667, 33 So. 724, 94 Am. St. Rep. 456. Partners suing for a libel on the firm cannot recover for individual mental anguish, but for such injury as they have sustained in their joint trade. *Donaghue v. Gaffy*, 53 Conn. 43.

25—*Bush v. McMann*, 12 Colo. App. 504, 55 Pac. 956; *Field v. Colson*, 93 Ky. 347, 20 S. W. 264; *Fellman v. Dreyfous*, 47 La. Ann. 907, 17 So. 422; *Waters v. Retail Clerks' Union*, 120 Ga. 424, 47 S. E. 911.

26—*Waters v. Retail Clerks' Union*, 120 Ga. 424, 47 S. E. 911.

may be safely said that any words, if false and malicious, imputing conduct which injuriously affects a man's reputation, or which tends to degrade him in society or bring him into public hatred and contempt, are in their nature defamatory, and either actionable *per se*, or may be made actionable by proper innuendoes or by alleging and proving special damage. And that words which are not in their nature defamatory, while perhaps, if false and malicious and if used by a person who knows, or ought to know, that special damage will follow, and such damage does in fact follow, an action of the case may be maintained whatever the nature of the words, yet cannot be made the basis for an action for libel or slander.²⁷

LIBEL.

Compared with Slander. The difference between slander and libel is sometimes said to be this: the one is oral defamation and the other is defamation propagated by printing, pictures, or other means open to the sight. There is, however, a difference in the substance of what shall constitute an actionable charge. It is perfectly reasonable to allow greater liberty of vocal speech than of writing or printing, for two very plain reasons:

1. Vocal utterance does not imply the same degree of deliberation; it is more likely to be the expression of momentary passion or excitement, and is not so open to the implication of settled malice. Therefore, if one shall say of his neighbor: "He is a rascal," there is no very strong probability that the expression will be received by by-standers as anything more than a mere vituperative epithet, indicative of the feelings of the utterer, rather than of his convictions. Therefore to such oral expressions little importance is generally attached. On the other hand the same words deliberately written or printed and afterward placed before the public, usually justify an inference that they are the expression of settled conviction, and they affect the public mind accordingly.

27—Reid *v.* Providence Journal Young *v.* McRae, 3 B. & S. 264; Co., 20 R. I. 120, 37 Atl. 637, citing Lynch *v.* Knight, 9 H. L. Cas. 589. Odgers, Libel and Slander, 88-91;

[*240] *2. An oral charge is merely heard, and the agency of the wrong-doer in inflicting injury is at an end when the utterance has died upon the ear. But the written or printed charge may pass from hand to hand indefinitely and for many years. It is an ever continuous defamation so long as that by means of which it is communicated remains in existence.

These reasons are taken notice of in the law, and some charges are held to be *prima facie* actionable as libel that are not actionable as oral slander, unless there be averment and proof that actual injury has resulted.²⁸ In other words, injury is presumed to follow the apparently deliberate act of putting the charge in writing or print, or of suggesting it by means of picture or effigy, where a mere vocal utterance to the same effect might be disregarded as probably harmless.

In some cases either slander or libel will lie, as where a letter is dictated to a stenographer who copies it out.²⁹

Classification of Libellous Charges. Libel per se. In libel, as in slander, defamatory publications are classified as publications actionable *per se*, and publications actionable on averment and proof of special damage. In the first class are embraced all cases of publications which would be actionable *per se* if made orally. These cases, therefore, require no further attention. It also embraces all other cases where the additional gravity imparted to the charge by the publication can fairly be supposed to

28—See *Republican Pub. Co. v. Cole v. Neustadter*, 22 Ore. 191, Mosman, 15 Colo. 399, 24 Pac. 29 Pac. 550; *Thomas v. Bowen*, 1051; *Cervený v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 29 Ore. 258, 45 Pac. 768; *Merchants' Ins. Co. v. Buckner*, 98 692, 13 L. R. A. 864; *Herrick v. Fed. 222*, 39 C. C. A. 19; *Ukman Tribune Co.*, 108 Ill. App. 244; *v. Daily Record Co.*, 189 Mo. 378, Riley *v. Lee*, 88 Ky. 603, 11 S. W. 88 S. W. 60.

29—*Gambrill v. Schooley*, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87. So where a message is sent by telephone and written out by the receiver. *Peterson v. Western Union Tel. Co.*, 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661.

make it damaging. Thus, to say of a man: "I look upon him as a rascal," is no slander, unless shown to be damaging; but if it be published of him in one of the public journals, the presumption that injury follows is reasonable and legitimate.³⁰ So, to call a man in print "an imp of the devil and cowardly snail," is libellous, though an oral imputation of the sort would be presumably harmless.³¹ So, to charge a teacher with falsehood in a report made to the official board, and with general untruthfulness, is libellous *per se*.³² The general rule is stated thus: Any false and malicious writing published of another is libellous *per se*, when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or *hinder virtuous men from associating with him.³³ "The nature of the charge," it is said in one [*241] case "must be such the court can legally presume [the plaintiff] has been degraded in the estimation of his acquaint-

30—Williams v. Karnes, 4 Humph. 9; Cropp v. Tilney, 3 Salk. 226; J. Anson v. Stewart, 1 T. R. 748. See Whitney v. Janesville Gazette, 5 Biss. 330.

31—Price v. Whitely, 50 Mo. 439. See Atwill v. Mackintosh, 120 Mass. 177; Cary v. Allen, 39 Wis. 481.

32—Lindley v. Horton, 27 Conn. 58.

33—Lindley v. Horton, 27 Conn. 58, 61; Thomas v. Croswell, 7 Johns. 264, 5 Am. Dec. 269; Clark v. Binney, 2 Pick. 115; McCorkle v. Burriss, 5 Binn. 349; Price v. Whitely, 50 Mo. 439; Hand v. Winton, 38 N. J. 122; Donaghue v. Gaffy, 54 Conn. 257; Crocker v. Hadley, 102 Ind. 416; Tillson v. Robbins, 68 Me. 295; Foster v. Scripps, 39 Mich. 376, 33 Am. Rep. 403; Bradley v. Cramer, 59 Wis. 309, 48 Am. Rep. 511; Schornberg v. Walker, 132 Cal. 224, 64 Pac. 290; Republican

Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051; Viedt v. Evening Star Newspaper Co., 8 Mackey, 534; Herrick v. Tribune Co., 108 Ill. App. 244; Prosser v. Callis, 117 Ind. 105, 19 N. E. 735; Doan v. Kelley, 121 Ind. 413, 23 N. E. 266; Patchell v. Jaqua, 6 Ind. App. 70, 33 N. E. 132; Morse v. Times-Republican Print. Co., 124 Ia. 707, 100 N. W. 867; Riley v. Lee, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358; Hatt v. Evening News Ass., 94 Mich. 114, 53 N. W. 952; Randall v. Evening News Ass., 101 Mich. 561, 60 N. W. 301; Byram v. Aiken, 65 Minn. 87, 67 N. W. 807; Alwin v. Liesch, 86 Minn. 281, 90 N. W. 404; Manget v. O'Neill, 51 Mo. App. 35; World Pub. Co. v. Mulden, 43 Neb. 126, 61 N. W. 108, 47 Am. St. Rep. 737; Triggs v. Sun Printing & Pub. Co., 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612; Winchell v. Argus Co.,

ances, or of the public, or has suffered some other loss, either in his property, character, or business, or in his domestic or social relations in consequence of the publication.”³⁴ Any words that tend to lower the plaintiff in the estimation of his friends³⁵ or in the common estimation of citizens,³⁶ or that tend to injure his social character or status,³⁷ or to destroy the confidence of his neighbors in his integrity, are libellous *per se*.³⁸ A published charge that the plaintiff, being a member of a certain political party, at one of its nominating conventions, offered a certain resolution, under the influence of a bribe, is a charge of this character. “When a citizen undertakes to exercise any of his political privileges, it is certainly his duty to act upon public considerations; to be influenced in such a matter by pecuniary motives, though it may not be punishable in some cases as a crime, is always disgraceful. Every one who, for a bribe, gives his vote or his influence to a candidate for nomination to a public position, does such act in secret, thus showing, by his avoidance of the public gaze, his consciousness of the unworthy part he is playing. Therefore, to print and publish that a man has been guilty of such an act must necessarily be to hold him up to the derision and contempt of the community.”³⁹ So, to publish of one: “His slanderous reports

69 Hun, 354, 23 N. Y. S. 650; *Cranfill v. Hayden*, 97 Tex. 544, 80 S. W. 609; *Moley v. Barager*, 77 Wis. 43, 45 N. W. 1082; *Allen v. News Pub. Co.*, 81 Wis. 120, 50 N. W. 1093; *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111; *Pfitzinger v. Dubs*, 64 Fed. 696, 12 C. C. A. 399. A libel is “any malicious publication, written, printed or painted, which by words or signs tends to expose a man to ridicule, contempt, hatred or degradation of character.” *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. Rep. 636.

34—*Stone v. Cooper*, 2 Denio, 299.

35—*Jones v. Roberts*, 73 Vt. 201, 50 Atl. 1071.

36—*Moss v. Harwood*, 102 Va. 386, 46 S. E. 385.

37—*Wood v. Boyle*, 177 Pa. St. 620, 35 Atl. 1131, 55 Am. St. Rep. 747.

38—*Montgomery v. Knox*, 23 Fla. 595, 3 So. 211.

39—BEASLEY, Ch. J., in *Hand v. Winton* 38 N. J. 122. See *Fitch v. De Young*, 66 Cal. 339; *Barr v. Moore*, 87 Pa. St. 385, 30 Am. Rep. 385. So it is libelous to charge a man with being a drunkard, a cuckold, a tory. LUMPKIN, J. “I never yet saw the man who liked to be considered a sot or drunk-

nearly ruined some of our best merchants'' is libellous.⁴⁰ So it is to publish: ''He did a good thing in his sober moments, in the way of collecting soldiers' claims against the government, for a fearful percentage. The blood money he got from the boys in blue* in this way is supposed to be a big thing,'' etc.⁴¹

So it is to publish: ''He appears to have been in col- [*242] lusion with ruffians.'' ⁴² So, since the belief that one is not in his right mind has a natural tendency to withdraw from him the association of his fellows, to publish of one that he is insane, and a fit person to be sent to the lunatic asylum, is libellous.⁴³ But it is not libellous to say of a merchant, he has refused to contribute his mite with his fellow merchants to water the street in front of his store: this may possibly have some tendency to induce an ill opinion of him; but as it implies neither moral nor legal wrong, but at most only a want of lib-

ard. Noah, the first drunken man, became thereby an object of ridicule to his own son. It was the third part of the then male world that manifested this mockery for this habit, and the other two-thirds did but conceal it. * * But this paper did not stop with imputing excessive debauchery to old man Thompson; it alleges further that he was decoyed into his cups for the purpose of being made a cuckold. If this charge would not expose him to universal scorn and contempt, I know not what would." *Giles v. State*, 6 Ga. 276-283.

40—*Cramer v. Noonan*, 4 Wis. 231.

41—*Sanderson v. Caldwell*, 45 N. Y. 398.

42—*Snyder v. Fulton*, 34 Md. 128, 6 Am. Rep. 314; and see *Woodard v. Eastman*, 118 Mass. 403; *Day v. Backus*, 31 Mich. 241; *Stilwell v. Barter*, 19 Wend. 487;

Hart v. Reed, 1 B. Mon. 166, 35 Am. Dec. 179.

43—*Perkins v. Mitchell*, 31 Barb. 461; *Lawson v. Morning Journal Ass.*, 32 App. Div. 71, 52 N. Y. S. 484; *Seip v. Deshler*, 170 Pa. St. 334, 32 Atl. 1032. It is libelous *per se* to publish of a man that he is "a skunk." *Massuere v. Dickens*, 70 Wis. 83, 35 N. W. 349. A "swine." *Solverson v. Peterson*, 64 Wis. 198, 54 Am. Rep. 607. Of a brick maker that "he is in the hands of a sheriff." *Hermann v. Bradstreet Co.*, 19 Mo. App. 227. Of a merchant that "he is financially embarrassed." *Newell v. How*, 31 Minn. 235. That one's house has been searched under legal process for stolen goods without success. *State v. Smily*, 37 Ohio St. 30, 41 Am. Rep. 487. For other illustrations see, *Shattuc v. McArthur*, 25 Fed. 133; *Shelby v. Sun Printing Co.*, 38 Hun, 474; *Broad v. Deuster*, 8

erality, it is not libellous.⁴⁴ Acts which neither the moral code nor the law of the land requires, it cannot be libellous to charge him with not performing.

It is libelous *per se* to write or print of one that he is a "liar,"⁴⁵ "a liar and a dead beat,"⁴⁶ "a gambler,"⁴⁷ "a sucker,"⁴⁸ "a eunuch,"⁴⁹ a "secret slanderer" or "scandal monger,"⁵⁰ that he is "slippery,"⁵¹ or that he is "a dangerous, able and seditious agitator,"⁵² that he is an "anarchist,"⁵³ or

Biss. 265; *State v. Mayberry*, 33 Kan. 441.

44—*People v. Jerome*, 1 Mich. 142. It is not libelous *per se* to call one a "crank." *Walker v. Tribune Co.*, 29 Fed. 827. To publish of a merchant that he has made a chattel mortgage. *Newbold v. Bradstreet*, 57 Md. 38, 40 Am. Rep. 426. Of grain dealers that they have combined to reduce the price of grain. *Achorn v. Piper*, 66 Ia. 694. Of a supervising architect that he took a commission from contractors to whom he gave work. *Legg v. Dunleavy*, 80 Mo. 558, 50 Am. Rep. 512. So it is not a libel that a company issued an order that "any employee who trades with P. will be discharged." *Payne v. R. R. Co.*, 13 Lea. 507. Nor to charge a merchant with ejecting a tenant for ceasing to deal with him. *Donaghue v. Gaffy*, 53 Conn. 43. Nor for a bank cashier to return paper indorsed "we return unpaid draft. He pays no attention to notices." *Platto v. Gielfuss*, 47 Wis. 491. Nor for a firm to notify their customers "we will not hereafter take in payment checks" on a certain bank. *Capital &c. Bank v. Henty*, L. R. 7 App. Cas. 741.

45—*Colvard v. Black*, 110 Ga. 642, 36 N. E. 80; *Riley v. Lee*, 88

Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358; *Allen v. Wortham*, 89 Ky. 485, 13 S. W. 73; *Mitchell v. Spradley*, 23 Tex. Civ. App. 43, 56 S. W. 134.

46—*Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869.

47—*Ferguson v. Evening Chronicle Pub. Co.*, 72 Mo. App. 463.

48—*Willmann v. Press Pub. Co.*, 49 App. Div. 35, 63 N. Y. S. 515. This appellation is equivalent to scoundrel.

49—*Eckert v. Van Pelt*, 69 Kan. 357, 76 Pac. 909, 66 L. R. A. 266.

50—*Patton v. Cruce*, 72 Ark. 421, 81 S. W. 380, 105 Am. St. Rep. 46, 65 L. R. A. 937.

51—*Peterson v. Western Union Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; *S. C. Peterson v. Western Union Tel. Co.*, 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581.

52—*Wilkes v. Shields*, 62 Minn. 426, 64 N. W. 921.

53—*Cerveney v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864. To say that plaintiff's restaurant is a resort for anarchists is a libel of the place and not of the plaintiff and

that he "would be an anarchist if he thought it would pay."⁵⁴ So of words imputing dishonesty,⁵⁵ or charging the plaintiff with getting the property of his friend by means of fraud and deception;⁵⁶ or that plaintiff is a hypocrite and under the cloak of hypocrisy oppresses the widows and orphans;⁵⁷ or that a son has squandered the estate of his parents and left them in want;⁵⁸ or that plaintiff is said to have been in the work-house and to have a criminal record;⁵⁹ or referring to a trade journal as a *fake* paper.⁶⁰

To charge a person with being a witch in a community where there are persons who still believe in witchcraft may be actionable *per se*.⁶¹ To refer to the plaintiff, whose name was Buckstaff, as Bucksniß, was held libelous *per se*, as suggesting a likeness to Pecksniß, one of the most contemptible characters in Dickens.⁶² So to make light and sport of a person's defects and deformities.⁶³ So to publish that a practicing dentist has committed suicide,⁶⁴ or to print an obituary notice of a living person.⁶⁵ In Louisiana it is libel to refer to a white man as a negro.⁶⁶ So in South Carolina.^{66a} It is libel to publish a young lady's picture in connection with a questionable advertise-

special damages must be shown to recover. *Bosi v. N. Y. Herald Co.*, 33 Misc. 622, 68 N. Y. S. 898.

54—*Lewis v. Daily News Co.*, 81 Md. 466, 32 Atl. 246, 29 L. R. A. 59.

55—*Wofford v. Meeks*, 129 Ala. 349, 30 So. 625, 87 Am. St. Rep. 66, 55 L. R. A. 214; *Hollenbeck v. Ristine*, 105 Ia. 488, 75 N. W. 355, 67 Am. St. Rep. 306; *McIntyre v. Weinert*, 195 Pa. St. 52, 45 Atl. 666; *Sanders v. Hall*, 22 Tex. Civ. App. 282, 55 S. W. 594.

56—*Stewart v. Pierce*, 93 Ia. 136, 61 N. W. 388.

57—*Jones v. Greeley*, 25 Fla. 629, 6 So. 448.

58—*McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673.

59—*Post Pub. Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921.

60—*Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223, 83 S. W. 298.

61—*Oles v. Pittsburg Times*, 2 Pa. Supr. Ct. 130.

62—*Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111.

63—*Ibid.*

64—*Cady v. Brooklyn Union Pub. Co.*, 23 Misc. 409, 51 N. Y. S. 198.

65—*McBride v. Ellis*, 9 Rich. 313, 70 Am. Dec. 210.

66—*Upton v. Times-Democrat Pub. Co.*, 104 La. 141, 28 So. 970.

66a—*Flood v. News & Courier Co.*, 71 S. C. 112, 50 S. E. 637; *Eden v. Legare*, 1 Bay, 171; *Woods v. King*, 1 Nott & McC. 184.

ment.⁶⁷ And so are words charging a man with improper relations with a woman.⁶⁸ And so of the following: A charge that plaintiff had "left the city with \$8,500 of the Southern Bank's money;"⁶⁹ to say of one holding a position of trust in a corporation who had disappeared, that he had been located in Canada where he was living in luxury;⁷⁰ to hold one up as a literary freak;⁷¹ to blacklist a person.⁷² Where libel is defined by statute, whatever is within the definition is libel *per se*.^{72a}

The following are not libelous *per se*: To charge one with doing what he has a lawful right to do, as trying to get a law passed that would relieve his property from a sewer assessment

67—Morrison *v.* Smith, 177 N. Y. 366, 69 N. E. 725.

68—Morey *v.* Morning Journal Assn. 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621; Collins *v.* Dispatch Pub. Co., 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. Rep. 636.

69—Turton *v.* N. Y. Recorder Co., 144 N. Y. 144, 38 N. E. 1009.

70—McDonald *v.* Press Pub. Co., 55 Fed. 264; Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155. "It is a matter of common knowledge that those of our countrymen who expatriate themselves under such circumstances in Canada are fugitives from justice." 55 Fed. 264.

71—Triggs *v.* Sun Printing & Pub. Co., 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612. See Triggs *v.* Sun Printing & Pub. Co., 91 App. Div. 259, 86 N. Y. S. 486.

72—White *v.* Parks, 93 Ga. 633, 20 S. E. 78; Weston *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86.

The following are additional cases wherein the words in question were held libelous *per se*. Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051; Paveseich *v.* New Eng. Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101; Prosser *v.* Callis, 117 Ind. 105, 19 N. E. 735; Fitzpatrick *v.* Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173; Johnson *v.* Synnett, 89 Hun, 192, 35 N. Y. S. 79; Van Ingen *v.* Star Co., 1 App. Div. 429, 37 N. Y. S. 114; Hollingsworth *v.* Spectator Co., 49 App. Div. 16, 63 N. Y. S. 2; De Sando *v.* N. Y. Herald Co., 88 App. Div. 492, 85 N. Y. S. 111; Martin *v.* Press Pub. Co., 93 App. Div. 531, 87 N. Y. S. 859; Woolworth *v.* Star Co., 97 App. Div. 525, 90 N. Y. S. 147; Mauk *v.* Brundage, 68 Ohio St. 89, 67 N. E. 152; Shelby *v.* Dampman, 1 Pa. Supr. Ct. 115; Dr. Shoop Family Med. Co. *v.* Wernick, 95 Wis. 164, 70 N. W. 160; Hanchett *v.* Chiatovitch, 101 Fed. 742, 41 C. C. A. 648.

72a—Halley *v.* Gregg, 74 Ia. 563, 38 N. W. 416.

by making the cost a general charge.⁷³ To charge a hotel man with being a hog, because he sent away for his supplies instead of buying them at home;⁷⁴ that plaintiff caused her husband to commit suicide, as she might be the innocent cause;⁷⁵ that plaintiff is a labor agitator;⁷⁶ or a man "of more or less indifferent repute;"⁷⁷ or that he had owed a debt for years and that when sued he slunk behind that statute of limitations.⁷⁸ Some further cases of words held not actionable *per se* are added in the margin.⁷⁹

Besides the publications mentioned, any untrue and malicious charge which is published in writing or print is libelous when damage is shown to have resulted as a natural and proximate consequence.⁸⁰

*When the words published are actionable *per se*, it is [*243] the duty of the court so to instruct the jury.⁸¹

73—Foot v. Pitt, 83 App. Div. 76, 82 N. Y. S. 464.

74—Urban v. Helmick, 15 Wash. 155, 45 Pac. 747. "To accuse one of being deficient in some quality which the law does not require him as a good citizen to possess is not libelous *per se*. The public may disapprove of appellants' conduct in thus exercising the right to trade outside the town where they reside, but the publication does not expose them to public hatred or contempt in the sense or to the degree required by the law of libel."

75—Brown v. Tribune Ass., 74 App. Div. 359, 77 N. Y. S. 461.

76—Wabash R. R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003.

77—Crashley v. Press Pub. Co., 179 N. Y. 27, 71 N. E. 258.

78—Hollenbeck v. Hall, 103 Ia. 214, 72 N. W. 518, 64 Am. St. Rep. 175, 39 L. R. A. 734.

79—Waters v. Retail Clerks' Union, 120 Ga. 424, 47 S. E. 911; Ulery v. Chicago Live Stock Exchange, 54 Ill. App. 233; Quinn v. Prudential Ins. Co., 116 Ia. 522, 90 N. W. 349; Field v. Colson, 93 Ky. 347, 20 S. W. 264; Labouisse v. Evening Post Pub. Co., 10 App. Div. 30, 41 N. Y. S. 688; Crawford v. Barnes, 118 N. C. 912, 24 S. E. 670; Dawson v. Baxter, 131 N. C. 65, 42 S. E. 456; Cole v. Neustadler, 22 Ore. 191, 29 Pac. 550; Fry v. McCord, 95 Tenn. 678, 33 S. W. 568; Hofflund v. Journal Co., 88 Wis. 369, 60 N. W. 263.

80—Quoted and held correct in Hollenbeck v. Ristine, 105 Ia. 488, 490, 75 N. W. 355, 67 Am. St. Rep. 306. But see *ante* *239; Reid v. Providence Journal Co., 20 R. I. 120, 37 Atl. 637.

81—Gottbehuet v. Hubachek, 36 Wis. 515. So in slander. Filber v. Dautermann, 28 Wis. 134.

Meaning and Construction of the Words Used. Questions for Court and Jury. If the words alleged to have been used, whether written or spoken, are not actionable *per se*, or if they do not refer to the plaintiff, or if they are ambiguous, or if their defamatory meaning depends upon a local or provincial use of a word or words, or if for any reason they require explanation by some extrinsic matter to make them actionable, such extrinsic facts must be alleged by way of inducement, both in order to show that the words are defamatory and to render the charge intelligible and certain.⁸² If the language is not actionable on its face and no extraneous facts are alleged, the action must fail.⁸³ It is immaterial how the imputation is conveyed, whether by a direct charge, or by insinuation, or by means of some hidden or covert meaning in the words.⁸⁴ Even the truth may be so stated as to imply a criminal charge and render the author liable. In one case it is said: "In order to constitute

82—*Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 499; *McLaughlin v. Fisher*, 136 Ill. 111, 24 N. E. 60; *Freeman v. Sander-son*, 123 Ind. 264, 24 N. E. 239; *Garrett v. Bissell Chilled Plow Works*, 154 Ind. 319, 56 Ind. 667; *Hinesley v. Sheets*, 18 Ind. App. 612, 48 N. E. 802, 63 Am. St. Rep. 356; *Lyons v. Stratton*, 102 Ky. 317, 43 S. W. 446; *Traynor v. Sielaff*, 62 Minn. 420, 64 N. W. 915; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 211, 22 N. E. 365; *Richmond v. Loeb*, 19 R. I. 120, 32 Atl. 167; *Clute v. Clute*, 101 Wis. 137, 76 N. W. 1114. Words spoken in a foreign language should be pleaded as spoken, with a translation. *Heeney v. Kilbane*, 59 Ohio St. 499, 53 N. E. 262.

83—*Quinn v. Prudential Ins. Co.*, 116 Ia. 522, 90 N. W. 346. The court says: "For a written or printed article to be defamatory, the language of the docu-

ment must be such that, when given its natural and ordinary meaning, it imputes to the person thus assailed some act, or attribute, or character which tends to expose him to public hatred, contempt or ridicule, or to deprive him of the benefit of public confidence and social intercourse; or if the language, upon its face, does not bear such injurious significance, then there must be shown extrinsic facts and circumstances by which it is made to appear that the writing, though innocent and unobjectionable in form, is intended to convey and does convey to its readers a defamatory meaning, as above defined." pp. 525-6.

84—*Republican Pub. Co. v. Miner*, 3 Colo. App. 568, 34 Pac. 485; *Covington v. Roberson*, 111 Ia. 326, 35 So. 586; *Hanchett v. Chiatovitch*, 101 Fed. 742, 41 C. A. 648.

a libel, it is not necessary that the language should in express terms charge a crime. The charge may be made by insinuation. If the language of the publication be calculated to induce those who read it to believe that the person of whom it is written is guilty of a crime, it is sufficient to support an action. The words of a publication might be literally true, yet if the sense of the publication is to impute a crime, it will be deemed libelous. Language is often more significant in suggestion than in expression. Truth half told is frequently more hurtful than blatant falsehood; it is not less venomous, and is more insidious.'⁸⁵

In determining whether the words charged are libelous *per se*, they are to be taken in their plain and natural import according to the ideas they are calculated to convey to those to whom they are addressed, reference being had not only to the words themselves, but also to the circumstances under which they were used.⁸⁶ They should receive a fair and reasonable construction,⁸⁷ and will be presumed to have been used in the ordinary

85—*Democrat Pub. Co. v. Jones*, 83 Tex. 302, 306, 18 S. W. 652. See also to same effect, *Behrè v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320. But see *Haynes v. Spokane Chronicle Pub. Co.*, 11 Wash. 503, 39 Pac. 969, where the contrary seems to be held. In this case facts were put in such a way as to insinuate, as claimed, that the plaintiff had committed a crime and was endeavoring to conceal the fact. The court held that there was no libel and says: "If the language complained of in this case imputed the crime alleged in the complaint, or any crime or moral obliquity whatever, to the appellant, it was not, as we have said, because of any direct assertion to the effect, but because of the inferences that might possibly be drawn from

the facts stated. And, if what was stated concerning appellant's action and conduct was true, did the statement of the truth render the publication libelous simply because the truth so stated was liable to suggest damaging inferences concerning him? We think not." pp. 509, 510.

86—*Stewart v. Pierce*, 93 Ia. 136, 61 N. W. 388; *Emerson v. Miller*, 115 Ia. 315, 88 N. W. 803; *Mudd v. Rogers*, 102 Ky. 280, 43 S. W. 255; *Boynton v. Shaw Stocking Co.*, 97 Mass. 219; *Beneway v. Thorpe*, 77 Mich. 181, 43 N. W. 863; *Pokrok Zapader Pub. Co. v. Zizkovsky*, 42 Neb. 64, 60 N. W. 358; *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747; *Pandow v. Eichsted*, 90 Wis. 298, 63 N. W. 284.

87—*Walker v. Hawley*, 56 Conn. 559, 16 Atl. 674.

import attached to them in the community in which they were uttered or published.⁸⁸ "In determining whether a given publication is libelous, the language thereof must be taken in its ordinary signification, and construed in the light of what might reasonably have been understood therefrom by the persons who read it. The question is, how would persons of ordinary intelligence understand the language."⁸⁹

In interpreting the language, it is not a question of the intent of the speaker or author, or even of the understanding of the plaintiff, but of the understanding of those to whom the words are addressed, and of the natural and probable effect of the words upon them.⁹⁰ It is no defense that no harm was intended or that the words were used in jest.⁹¹ A person is presumed to intend the natural consequences of his acts and defamation consists solely in the effect produced upon the minds of third parties.⁹²

88—*Reid v. Providence Journal Co.*, 20 R. I. 120, 37 Atl. 367. On demurrer to the narr. if the words are fairly susceptible of the meaning ascribed to them, the demurrer should be overruled. *Harkness v. Chicago Daily News Co.*, 102 Ill. App. 162; *Wilcox v. Moon*, 63 Vt. 481, 22 Atl. 80.

89—*Herringer v. Ingberg*, 91 Minn. 71, 97 N. W. 460.

90—*Arnott v. Standard Ass.*, 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69; *Irlbeck v. Bierle*, 84 Ia. 47, 50 N. W. 36; *Ellis v. Whitehead*, 95 Mich. 105, 54 N. W. 752; *Barr v. Beikner*, 44 Neb. 197, 62 N. W. 494; *Goebeler v. Wilhelm*, 17 Pa. Supr. Ct. 432; *Wilcox v. Moon*, 63 Vt. 481, 22 Atl. 80. In *Lally v. Emery*, 54 Hun, 517, 8 N. Y. S. 135, is held that the defendant may testify as to his intent.

91—*Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730.

92—*Hamlin v. Fanti*, 118 Wis. 594, 95 N. W. 955. The court says: "The gravamen of that wrong (slander) is not the verbal assault upon the plaintiff, but the injury resulting to him from the effect upon others of the publication of false defamatory charges. That the words were intended by the utterer and understood by the plaintiff in one sense is quite immaterial, if they naturally might be and were understood in another by the hearers. The effect upon them is what causes the plaintiff the damage recoverable in an action of slander, not the attitude of the defendant. Defendant must be conclusively presumed to foresee the natural and probable effects of his acts, and to intend the meaning which his words will convey to the hearers in the light of all the circumstances known to them." pp. 547-8.

If the language is plain and free from ambiguity it is solely a question for the court whether it is actionable.⁹³ Otherwise its construction and meaning is a question of fact for the jury.⁹⁴ The whole article or conversation is to be considered in determining whether any part is libelous.⁹⁵ "It is what is understood by those who hear the whole conversation which is to determine the question as to the slanderous character of the utterances, and not mere catch words heard by a passing witness."⁹⁶

Where the words are ambiguous it is held proper to permit witnesses, who have heard or read them, to testify as to what they understood them to mean.⁹⁷ The supreme court of Cali-

93—*Gerald v. Inter Ocean Pub. Co.*, 90 Ill. App. 205; *Herrick v. Tribune Co.*, 108 Ill. App. 244; *Mosier v. Stoll*, 119 Ind. 244, 20 N. E. 754; *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; *Kuster v. Press Pub. Co.*, 80 App. Div. 615, 80 N. Y. S. 1050; *Fry v. McCord Bros.*, 95 Tenn. 678, 33 S. W. 568; *Colulla v. Kerr*, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; *Norton v. Livingston*, 64 Vt. 473, 24 Atl. 247; *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747. In such case it is error to leave its construction and meaning for the jury. *Hamlin v. Fanti*, 118 Wis. 594, 95 N. W. 955; *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214.

94—*Arnott v. Standard Ass.*, 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69; *Rutherford v. Paddock*, 180 Mass. 239, 62 N. E. 381, 91 Am. St. Rep. 282; *Loranger v. Loranger*, 115 Mich. 681, 74 N. W. 228; *Kuster v. Press Pub. Co.*, 80 App. Div. 615, 80 N. Y. S. 1050; *Colulla v. Kerr*, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; *Norton v. Livingston*, 64 Vt. 473, 24

Atl. 247; *McDonald v. Press Pub. Co.*, 55 Fed. 264; *Hanchett v. Chratovitch*, 101 Fed. 742, 41 C. C. A. 648; *Cosand v. Lee*, 11 Ind. App. 511, 38 N. E. 1099; *Alcorn v. Bass*, 17 Ind. App. 500, 46 N. E. 1024; *Morse v. Times-Republican Print. Co.*, 124 Ia. 707, 100 N. W. 867; *Jensen v. Damm*, 127 Ia. 555; *Call v. Hayes*, 169 Mass. 586, 48 N. E. 777; *Ewing v. Ainger*, 96 Mich. 587, 55 N. W. 996; *McGinnis v. Knapp*, 109 Mo. 131, 18 S. W. 1134; *Walker v. Hoeffner*, 54 Mo. App. 554; *Warner v. Southall*, 165 N. Y. 496, 59 N. E. 269; *Garby v. Bennett*, 40 App. Div. 163, 57 N. Y. S. 853.

95—*Searcy v. Sudhoff*, 84 Ill. App. 148; *Mosier v. Stoll*, 119 Ind. 244, 20 N. E. 752; *Kilgour v. Evening Star Co.*, 96 Md. 16, 53 Atl. 716; *Norton v. Livingston*, 64 Vt. 473, 24 Atl. 247.

96—*Kidd v. Ward*, 91 Ia. 371, 377, 59 N. W. 279.

97—*Binford v. Young*, 115 Ind. 174, 16 N. E. 142; *Freeman v. Sanderson*, 123 Ind. 264, 24 N. E. 239; *McCorack v. Sweeney*, 140 Ind. 680, 40 N. E. 114; *Wimer v. Allbaugh*, 78 Ia. 79, 42 N. W. 587, 16 Am. St. Rep. 422; *Farrand*

fornia holds that where the words are ambiguous and their application doubtful, it must be shown, first, that the words were actually used in their actionable sense and were applied to the plaintiff, and, second, that the hearers so understood them, and that therefore the evidence of the hearers or readers as to how they understood them is competent. "Great care, however, should be taken," says the court, "that, under the pretense of showing how the hearers understood an ambiguous expression, the mere opinion of the witness as to the interpretation of the language should not be received."⁹⁸ But where there is no ambiguity or uncertainty in the language used, and no extrinsic facts which cast doubt upon the meaning intended, such evidence is not competent.⁹⁹

Where a libelous article does not name or identify the person referred to, it is proper to give in evidence all the surrounding circumstances and other extraneous facts which tend to show that the plaintiff was referred to or intended.¹ Where a suit was brought for a libelous article published in an evening paper by the defendant which did not name the plaintiff, but which was based on articles in the morning papers of the same date that did name or otherwise point out the plaintiff, so that any

v. Aldrich, 25 Mich. 593, 48 N. W. 628; *Gribble v. Pioneer Press Co* 37 Minn. 277, 34 N. W. 30; *Houston Printing Co. v. Moulden*, 15 Tex. Civ. App. 574, 41 S. W. 381.

98—*Hearne v. De Young*, 119 Cal. 670, 679, 52 Pac. 150, 499.

99—*Quinn v. Prudential Ins. Co.*, 116 Ia. 522, 90 N. W. 349; *Soloman v. Am. Mercantile Exchange*, 93 Me. 436, 45 Atl. 510, 74 Am. St. Rep. 366. In the last case the court says that the better rule is "that where the whole language is capable of being fully stated to the jury, and where the speaker's or writer's meaning is conveyed in direct terms and not by incomplete expressions, nor by

signs, gestures, pictures or the like, it is not competent for a witness to give his opinion or understanding of the meaning intended by the one who used the language. Under such circumstances the words speak for themselves." p. 438.

1—*Colvard v. Black*, 110 Ga. 642, 36 S. E. 80; *Holmes v. Clisby*, 118 Ga. 820, 45 S. E. 684; *McLaughlin v. Schnellbacher*, 65 Ill. App. 50; *Van Ingen v. Mail & Express Pub. Co.*, 156 N. Y. 376, 50 N. E. 979; *Palmer v. Bennett*, 83 Hun, 220, 31 N. Y. S. 567; *Houston Printing Co. v. Mouldin*, 15 Tex. Civ. App. 574, 41 S. W. 381.

one who had read the latter would know to whom the former referred, it was held competent to put in evidence the articles in the morning papers.² Whether witnesses who have read the article may state to whom they understood it to refer, is a question involved in some doubt. Some authorities hold that such evidence is competent.³ Other cases hold such evidence incompetent and that it is necessary that the jury should be able to make out that the plaintiff was the person referred to or intended from the article and surrounding circumstances.⁴ It is immaterial that the plaintiff's name is misspelled if, as spelled, it has the same sound,⁵ or that the first name is incorrectly given, where it is otherwise apparent that it relates to the plaintiff.⁶ Where the article names the person referred to and there are two persons of that name, of whom the plaintiff is one, it is a question of fact whether the words were spoken of and concerning the plaintiff and, if not, he has no cause of action, though he may suffer harm therefrom.⁷ But in determining

2—*Van Ingen v. Mail & Express Co.*, 156 N. Y. 376, 50 N. E. 979. The court says: "I cannot believe that a newspaper can publish a libel which its editor knew at the time related to a particular individual, and would be so understood by the public by reason of a former publication, and then properly have the publication excluded, although it would show that the community would recognize the plaintiff as the person alluded to in its article. In other words, it seems to me that a defendant cannot publish a libel of another and shield himself by not disclosing the name of the person to whom it was intended to refer, when he knows and understands that by reason of former publications the public mind is in a condition where it would necessarily understand the article as applying to him alone." pp. 387-8.

3—*Holmes v. Clisby*, 118 Ga. 820, 45 S. E. 684; *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628; *Houston Printing Co. v. Moulden*, 15 Tex. Civ. App. 574, 41 S. W. 381; *Enquirer Co. v. Johnston*, 72 Fed. 443, 18 C. C. A. 628. "Where slanderous words are written or spoken of one, by indirection, and are read or heard by persons conversant with the facts, it is competent to prove by such persons, who, in their opinion, was referred to by the language used." *Prosser v. Callis*, 117 Ind. 105, 110, 19 N. E. 735.

4—*Stokes v. Morning Journal Ass.*, 66 App. Div. 569, 73 N. Y. S. 245; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995.

5—*Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628.

6—*Stromberg v. Tribune Ass.*, 88 App. Div. 589, 85 N. Y. S. 259.

7—*Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462,

this question it is not simply a question of intent on the part of the defendant. If he intended the defendant, or if for want of due care and diligence in ascertaining the facts, the matter is put in such a way that it might be naturally and reasonably inferred that he was intended, then in either case he is liable.⁸ Where the charge is against a family or class of persons, any one of the family or class may have an action if the jury find that the words have a personal application to him and that he is included in the class.⁹

The Innuendo. The office, scope and purpose of the innuendo and other parts of the plaintiff's pleading have been well stated as follows: "It is not permissible to enlarge and extend the meaning of the words spoken, beyond their natural import, by the innuendo, except so far as such enlarged meaning is war-

20 L. R. A. 856. In this case the defendant published an item of police news concerning, as printed, "H. P. Hanson, a real estate and insurance broker of South Boston." The article was substantially true, except that it related to A. P. H. Hanson. The plaintiff, H. P. Hanson, also a real estate and insurance broker of South Boston, brought suit. It was shown and the jury found that the article related to A. P. H. Hanson and not to the plaintiff and a judgment for the defendant was affirmed. The court says: "The language itself, in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name H. P. Hanson was used by mistake. As the evidence showed that the words were published of and concerning A. P. H. Hanson, the finding that they were not published of the plaintiff followed of neces-

sity. The article was of such a kind that it referred, and could refer, to but one person only; when that person was ascertained, it might appear that the publication as against him was or was not libelous, and his rights, if he brought a suit, would depend upon the finding in respect to that. No one else would have a cause of action, even if, by reason of identity of name with that used in the publication, he might suffer some harm." p. 298. Three judges dissented.

8—Clark v. North Am. Co., 203 Pa. St. 346, 53 Atl. 237; Hulbert v. New Nonpareil Co., 111 Ia. 490, 82 N. W. 928; Davis v. Marxhausen, 86 Mich. 281, 49 N. W. 50; Davis v. Marxhausen, 103 Mich. 315, 61 N. W. 504; Farley v. Evening Chronicle Pub. Co., 113 Mo. App. 216.

9—Prosser v. Callis, 117 Ind. 105, 19 N. E. 735; Boehmer v. Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822, 34 Am. St. Rep. 318.

ranted by prefatory matter set forth in the inducement or colloquium. An innuendo is properly used to point the meaning of the words alleged to have been spoken, in view of the occasion and circumstances, whether appearing in the words themselves, or extraneous prefatory matters alleged in the declaration. * * * If the words alleged to have been spoken are not slanderous *per se*, or if they do not refer to the plaintiff, or if they require explanation by some extrinsic matter to render them actionable, such extrinsic facts must be alleged by way of inducement, and thus render the charge intelligible and certain. The colloquium is to connect the words spoken, with the plaintiff, and with the extrinsic matters, if any, set forth by way of inducement.¹⁰ The innuendo cannot change, enlarge, extend or add to the sense or effect of the words declared on, or properly impute to them a meaning, which the publication, either in itself, or taken in connection with the facts stated in the inducement and colloquium, does not warrant or fairly imply.¹¹ If the words are incapable of a defamatory meaning, they cannot be made so by innuendo.¹² Whether the words are capable of the defamatory meaning ascribed to them in the innuendo, is a question of

10—McLaughlin v. Fisher, 136 Ill. 111, 116, 117, 24 N. E. 60.

11—Gaither v. Advertiser Co., 102 Ala. 458, 14 So. 788; Central of Georgia Ry. Co. v. Sheftall, 118 Ga. 865, 45 S. E. 687; Herrick v. Tribune Co., 108 Ill. App. 244; Stutsman v. Stutsman, 32 Ind. App. 73, 66 N. E. 773; Quinn v. Prudential Ins. Co., 116 Ia. 522, 90 N. W. 349; Craig v. Pyles, 101 Ky. 593, 39 S. W. 33; Bearce v. Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; Lewis v. Daily News Co., 81 Md. 466, 32 Atl. 246, 29 L. R. A. 59; Kilgour v. Evening Star Co., 96 Md. 16, 53 Atl. 716; Herringer v. Ingberg, 91 Minn. 71, 97 N. W. 460; Cole v. Neustadter, 22 Ore. 191, 29 Pac. 550; Price v. Conway. 134 Pa. St. 340,

19 Atl. 687, 19 Am. St. Rep. 704, 8 L. R. A. 193; Naulty v. Bulletin Co., 206 Pa. St. 128, 55 Atl. 862; Hackett v. Providence Tel. Pub. Co., 18 R. I. 589, 29 Atl. 143; Moss v. Harwood, 102 Va. 386, 46 S. E. 385. Extrinsic facts necessary to show the word's actionable must be alleged by way of inducement and not as part of the innuendo. Freeman v. Sanderson, 123 Ind. 264, 24 N. E. 239; Emig v. Daum, 1 Ind. App. 146.

12—Walford v. Herald Printing & Pub. Co., 133 Ind. 372, 32 N. E. 929; Wallace v. Homestead Co., 117 Ia. 348, 90 N. W. 835; Vickers v. Stoneman, 73 Mich. 419, 41 N. W. 495.

law for the court.¹³ When the words in themselves are actionable *per se* no innuendo is needed,¹⁴ and if the innuendo alleged is not borne out by the words, it may be treated as surplusage and a recovery had on the words themselves.¹⁵

Truth as a Defense. The truth of the injurious charge is a defense to a civil action, though it is not always a defense to a criminal prosecution. But even in a civil suit it is necessary to plead it specially.¹⁶ The law implies the falsehood of a

13—*McDonald v. Lord*, 27 Ill. App. 111; *Herrick v. Tribune Co.*, 108 Ill. App. 244; *Naulty v. Bulletin Co.*, 206 Pa. St. 128, 55 Atl. 862.

14—*Central of Georgia Ry. Co. v. Sheftall*, 118 Ga. 865, 45 S. E. 687; *Boureseau v. Detroit Evening Journal Co.*, 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320; *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. Rep. 636.

15—*Haynes v. Clinton Printing Co.*, 169 Mass. 512, 48 N. E. 275; *Sanford v. Rowley*, 93 Mich. 119, 52 N. W. 1119; *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725; *Brown v. Tribune Ass.* 74 App. Div. 359, 77 N. Y. S. 461; *Martin v. Press Pub. Co.*, 93 App. Div. 531, 87 N. Y. S. 859; *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. Rep. 636; *Brown v. Providence Tel. Pub. Co.*, 25 R. I. 117, 54 Atl. 1061; *Jones v. Roberts*, 73 Vt. 201, 50 Atl. 1071; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725; *Culmer v. Canby*, 101 Fed. 195, 41 C. C. A. 302. For a qualification of the rule see *Hilder v. Brooklyn Daily Eagle*, 45 Misc. 165, 91 N. Y. S. 983. In *Herrick v. Tribune Co.*, 108 Ill. App. 244, it is held that the plaintiff cannot reject the mean-

ing given in the innuendo and resort to another meaning without amendment.

16—*Updégrove v. Zimmerman*, 13 Pa. St. 619; *Porter v. Botkins*, 59 Pa. St. 484; *Barns v. Webb*, 1 Tyler, 17; *Hutchinson v. Wheeler*, 35 Vt. 330; *Sheahan v. Collins*, 20 Ill. 325; *Thomas v. Dunaway*, 30 Ill. 373; *Van Ankin v. Westfall*, 14 Johns. 233; *Wormouth v. Cramer*, 3 Wend. 395, 20 Am. Dec. 706; *Beardsley v. Bridgman*, 17 Iowa, 290; *Thompson v. Bowers*, 1 Doug. Mich. 321; *Huson v. Dale*, 19 Mich. 17; *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156; *Kelley v. Dillon*, 5 Ind. 426; *Knight v. Foster*, 39 N. H. 576; *Jarnigan v. Fleming*, 43 Miss. 710, 5 Am. Rep. 514; *Bourland v. Eidson*, 8 Gratt. 27; *Scott v. McKinnish*, 15 Ala. 662; *Donaghue v. Gaffy*, 53 Conn. 43; *Continental Nat. Bank v. Bowdre*, 92 Tenn. 723, 23 S. W. 131. If, however, the communication was privileged, so as not to be actionable, in the absence of malice, the truth may be shown without being pleaded. *Chapman v. Calder*, 14 Pa. St. 365; *Edwards v. Chandler*, 14 Mich. 471, 90 Am. Dec. 249. The truth of the charge cannot be proved in mitigation of damages when not pleaded.

damaging charge, and will not suffer it to be brought in question unless the plaintiff by the pleadings is apprised of the purpose to do so.¹⁷

Where the charge complained of imputes to the plaintiff criminal conduct, and the truth is relied upon as a justification, it is sufficient to support the plea by a preponderance of evidence; it is not necessary that the crime be made out beyond a reasonable doubt.¹⁸ This is a general rule where the question of criminality *is made an issue in a civil suit; it is sufficient to establish it by such evidence as would support any other [*244] fact involved in a civil controversy.¹⁹ Some cases, however, dissent from this doctrine, and require the same strict proof of the charge that would be required if the party were

Thompson v. Bowers, 1 Doug. Mich. 321, and cases cited. *Donaghue v. Gaffy*, 53 Conn. 43.

17—It is questionable whether the law ought not to hold truthful publications libelous in some cases, where they relate to matters that no one has any business to bring before the public at all, and are made with no other purpose than to annoy and subject to ridicule. Thus it is conceivable that the most innocent acts in a man's private life, or personal peculiarities, for which he is in no way responsible, may be so made use of by a mischievous person as to destroy the comfort of life; and it seems unreasonable that no personal redress can be had. The criminal law sometimes punishes truthful publications where they are made without justifiable occasion; and if the fact stated, conceding its truth, is not of a character that should affect one injuriously, and the damaging consequence results from the artful and persistent manner in which the pub-

lisher places it before the public, it would seem that there ought to be some remedy besides such as the public authorities may see fit to pursue.

18—*Ellis v. Buzzell*, 60 Me. 209, 11 Am. Rep. 204; *Matthews v. Huntley*, 9 N. H. 146; *Kincade v. Bradshaw*, 3 Hawks, 63; *McBee v. Fulton*, 47 Md. 403, 28 Am. Rep. 465; *Riley v. Norton*, 65 Ia. 306, overruling earlier cases in Iowa; *Express, &c., Co. v. Copeland*, 64 Tex. 354; *Atlanta Journal v. Mayson*, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104.

19—*Schmidt v. N. Y. Union Ins. Co.*, 1 Gray, 529; *Gordon v. Parmelee*, 15 Gray, 413; *Scott v. Home Ins. Co.*, 1 Dill. 105; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Washington Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v. Milwaukee, etc., Ins. Co.*, 37 Wis. 31, 19 Am. Rep. 747; *Knowles v. Scribner*, 57 Me. 495; *Marshall v. Thames, etc., Ins. Co.*, 43 Mo. 586; *Rothschild v. Am. Cent. Ins. Co.*, 62 Mo. 356. See *Williams v. Gun-*

on trial for the alleged crime; that is, of guilt beyond a reasonable doubt.²⁰

Words alleged to be libelous will receive an innocent construction if they are fairly susceptible of it, and when it is uncertain whether they convey a defamatory imputation the question is one for the jury.²¹

When the truth is relied upon as a defense, it must be proved substantially as laid.²³ The rule of the common law is, that an unsuccessful attempt to justify may be taken into account in aggravation of damages,²⁴ but this rule is abolished by statute in some States.

20—*Chalmers v. Shackell*, 6 C. H. 283; *Evarts v. Smith*, 19 Mich. & P. 475; *Thurtell v. Beaumont*, 1 Bing. 339; *Willmet v. Hanner*, 8 C. & D. 695; *Fountain v. West*, 23 Iowa, 9, 92 Am. Dec. 405; *Ellis v. Lindley*, 38 Iowa, 461; *Tucker v. Call*, 45 Ind. 31.

21—*Mulligan v. Cole*, L. R. 10 Q. B. 549; S. C. 14 Moak, 352; *Jenner v. A'Beckett*, L. R. 7 Q. B. 11; S. C. 1 Moak, 9; *Thompson v. Grimes*, 5 Ind. 385; *Zier v. Hoffman*, 33 Minn. 66, 53 Am. Rep. 9. See *ante*, p. 411. It is competent to show how foreign words are commonly understood. *Blakeman v. Blakeman*, 31 Minn. 396. Seemingly innocent words may be shown to have been intended and understood in another than the usual meaning. *Works v. Stevens*, 76 Ind. 181; *Knapp v. Fuller*, 55 Vt. 311, 45 Am. Rep. 618. Where words are unequivocal, and there is nothing to show that they were used in an unusual sense, the court must determine whether they cover a crime. *Pittsburgh, etc., Ry. Co. v. McCurdy*, 114 Pa. St. 554, 60 Am. Rep. 362.

23—*Carpenter v. Bailey*, 56 N.

H. 283; *Evarts v. Smith*, 19 Mich. 55; *Whittemore v. Weiss*, 33 Mich. 348; *Palmer v. Smith*, 21 Minn. 419; *Sheehy v. Cokley*, 43 Iowa, 183, 22 Am. Rep. 236.

24—*Root v. King*, 7 Cow. 613; *Gorman v. Sutton*, 32 Pa. St. 247; *Updegrove v. Zimmerman*, 13 Pa. St. 619; *Freeman v. Tinsley*, 50 Ill. 497; *Harbison v. Shook*, 41 Ill. 141; *Cavanaugh v. Austin*, 42 Vt. 576; *Westerfield v. Scripps*, 119 Cal. 607, 51 Pac. 958; *Coffin v. Brown*, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732. See *Aird v. Fireman's, etc., Co.*, 10 Daly, 254. It may be evidence of malice, but is not ground itself for giving direct damages. *Ward v. Dick*, 47 Conn. 300. Where by statute such failure is not sufficient to base an inference of malice upon, the justification must be more than colorable. *Proctor v. Houghtaling*, 37 Mich. 41. But in a late Georgia case it is held that proof which tends to support, but is insufficient to prove, a justification may be considered in mitigation of damages. *Henderson v. Fox*, 80 Ga. 479, 6 S. E. 164. See

It is no defense that the defendant believed in good faith that the charge was true and that he had reasonable and probable grounds for such belief.²⁵ "A person publishes libelous matter at his peril."²⁶ The defendant cannot justify the charge as a joke, for one jests at his peril with the reputation of another.²⁷ When the defendant pleads a justification he has the burden of proof and is entitled to the open and close.²⁸ "It is well settled that a defendant is not required in an action of slander or libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified. Immaterial variances and defects of proof upon immaterial matters go for nothing, and, if the gist of the charge is established by the evidence, the defendant has made his case."²⁹

Proof of Words Alleged. Whether the precise words alleged must be proven in order to establish the plaintiff's case, there is a difference of opinion. Some authorities hold that it is suffi-

also *Hoey v. Fletcher*, 39 Fla. 325, 22 So. 716; *McAllister v. Detroit Free Press Co.*, 85 Mich. 453, 48 N. W. 612. When no plea of justification the source of defendant's information may be shown on mitigation of damages. *Folwell v. Providence Journal Co.*, 19 R. I. 551, 37 Atl. 6.

25—*Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655; *Blocker v. Schoff*, 83 Ia. 265, 48 N. W. 1079; *Lehrer v. Elmore*, 100 Ky. 56, 37 S. W. 292; *Louisville Press Co. v. Tennelly*, 105 Ky. 365, 49 S. W. 15; *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Long v. Tribune Printing Co.*, 107 Mich. 207, 65 N. W. 108; *Pokrok Zapader Pub. Co. v. Zizkowsky*, 42 Neb. 64, 60 N. W. 358; *Stuart v. News Pub. Co.*, 67 N. J. L. 317, 51 Atl. 709; *Morey v. Morning Journal Ass.*, 123 N. Y. 207, 25 N. E. 161, 20 Am. St.

Rep. 730, 9 L. R. A. 621; *Patten v. Belo*, 79 Tex. 41, 14 S. W. 1037.

26—*Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97. The defendant published an item in its paper that plaintiff "was jailed last night on a charge of horse stealing." It was held that the defendant could only justify by proving the charge true, not by proving that it was made. *Houston Printing Co. v. Dement*, 18 Tex. Civ. App. 30, 44 S. W. 558.

27—*Triggs v. Sun Printing & Pub. Co.*, 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612.

28—*Stallings v. Whittaker*, 55 Ark. 494, 18 S. W. 829; *Palmer v. Adams*, 137 Ind. 72, 36 N. E. 695; *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314.

29—*Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 499.

cient to prove words substantially the same in meaning as those alleged and that it is not necessary to prove the exact words pleaded.³⁰ Others hold that the precise words alleged must be proven, or enough of them to make out the charge.³¹ Where the words were alleged in the third person and proved in the second, the variance was held fatal.³² Where the words were alleged to have been spoken in German and the meaning in English given and the proof showed the use of German words slightly different but having the same meaning in English, the variance was held immaterial.³³ Where a declaration in libel alleged a charge of "false swearing" and the writing offered in evidence had the expression, "fauls swearing" and "faults swearing," it was held a case of *idem sonans* and no variance.³⁴

[*245] ***Malice.** The definitions of slander and libel usually include malice as one of the necessary ingredients. From what has already appeared, however, it is manifest that they must employ this word in some other than the ordinary sense. In many cases of aggravated injury, there is really no malice at all, and no intent to injure; at most, there is only thoughtlessness or negligence; as where one thoughtlessly repeats a rumor, or a newspaper publisher copies from some other paper an article concerning a stranger, which he supposes to be true, but which is not so in fact. Sometimes there is not even negligence; as where a publisher has taken all reasonable precautions to prevent untrue and injurious publications, and one nevertheless creeps in as the result of accidental circumstances. In all such cases the absence of malice may be important to protect one

30—*Emerson v. Miller*, 115 Ia. 315, 88 N. W. 803; *Barr v. Beikner*, 44 Neb. 197, 62 N. W. 494; *Posnett v. Marble*, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162; *Kidder v. Bacon*, 74 Vt. 263, 52 Atl. 322; *Sharp v. Bowler*, 103 Ky. 282, 45 S. W. 90.
 31—*Ransom v. McCurley*, 140 Ill. 626, 31 N. E. 119; *Iles v. Swank*, 202 Ill. 453, 66 N. E. 1042;
Storey v. Jones, 52 Ill. App. 112; *Richards v. Baumgart*, 56 Ill. App. 422; *Searcy v. Sudhoff*, 84 Ill. App. 148; *Roberts v. Lamb*, 93 Tenn. 343, 27 S. W. 668.
 32—*Becker v. Schiller*, 49 Ill. App. 606.
 33—*Schild v. Legler*, 82 Wis. 73, 51 N. W. 1099.
 34—*Gaines v. Gaines*, 109 Ill. App. 226.

against exemplary damages; but it cannot bar the action. It seems misleading, therefore, to employ the terms malice, and malicious, in defining these wrongs; and, in a legal sense, as used they can only mean that the false and injurious publication has been made without legal excuse. One may be excused in morals and yet not in law; it is the protection of the party injured the law aims at, not the punishment of bad motive instigating bad action in the party injuring him.³⁵

"Malice, in an action of this kind, consists in intentionally doing without justifiable cause that which is injurious to another, and everything injurious to the character of another, is, in this action, taken to be false, until it is shown by plea to be true. Therefore every publication injurious to the character, is, in law, false and malicious, until the presumption of falsehood is met by plea of the truth, or the presumption of malice is removed by showing a justifiable occasion or motive."²⁶ Belief in

35—"Malice, in common acceptance, means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." BAYLEY, J., in *Bromage v. Prosser*, 4 B. & C. 255. Malice is alleged in the declaration, "rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose." ABBOTT, Ch. J., in *Duncan v. Thwaites*, 3 B. & C. 556, 585. See *Moore v. Stevenson*, 27 Conn. 14; *Barr v. Moore*, 87 Pa. St. 385, 30 Am. Rep. 367; *Maclean v. Scripps*, 52 Mich. 214.

36—*Lewis v. Daily News Co.*, 81 Md. 466, 473, 32 Atl. 246, 29 L. R. A. 59. See also *Long v. Tribune Printing Co.*, 107 Mich. 207, 65 N. W. 108. "Malice has always been divided into two kinds: implied malice, or malice in law, and express malice or malice in

fact. The first is shown by mere proof of the unauthorized use of the defamatory words charged. The second may be shown by the acts or conduct of the defendant immediately accompanying the utterance of the words or by the utterance at other times of other and similar defamatory words, having reference to the subject-matter of the words charged." *Gambrill v. Schooley*, 95 Md. 260, 289, 52 Atl. 500. In California it is held that express malice or malice in fact is necessary for the recovery of punitive damages but that such malice is implied or presumed from the publication of words actionable *per se*. *Childers v. Mercury P. & P. Co.*, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40. And see *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392; *Taylor v. Hearst*, 118 Cal. 366, 50 Pac. 541. "If the act complained of was conceived in the spirit of

the truth of the charge, and the absence of ill will toward the defendant, cannot be proved as a defense to an action for defamation.³⁷ "Evidence of other or similar slanderous words, spoken at other times and places, is admissible to show that the words charged in the complaint were spoken with malice and ill-will."³⁸ So of repetitions of the slander charged by the defendant whether before or after the occasion sued for, or before or after suit commenced.³⁹ But not repetition by third

mischief, or of criminal indifference to civil obligations, then there is express malice." *Casey v. Hulan*, 118 Ind. 590, 21 N. E. 322. That malice is implied from the falsity of the charge, see *Hatch v. Potter*, 7 Ill. 725, 43 Am. Dec. 88; *Rearick v. Wilcox*, 81 Ill. 77; *Pennington v. Meeks*, 46 Mo. 217; *Mousler v. Harding*, 33 Ind. 176; *Indianapolis Sun v. Horrell*, 53 Ind. 527; *Moore v. Butler*, 48 N. H. 161; *Dillard v. Collins*, 25 Grat. 343; *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102; *Lick v. Owen*, 47 Cal. 252; *Parker v. Lewis*, 2 Green (Iowa) 311; *Bergmann v. Jones*, 94 N. Y. 51; *Barr v. Moore*, 87 Penn. St. 385; *Stallings v. Whittaker*, 55 Ark. 494, 18 S. W. 829; *Gaines v. Belding*, 56 Ark. 100, 19 S. W. 236; *Harris v. Zazone*, 93 Cal. 59, 28 Pac. 845; *Heintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Gilmore v. Litzchman*, 41 Ill. App. 541; *Colby v. McGee*, 48 Ill. App. 294; *McDonald v. Nugent*, 122 Ia. 651, 98 N. W. 506; *Evening Post Co. v. Richardson*, 113 Ky. 641, 68 S. W. 655; *Savoil v. Scanlan*, 43 La. Ann. 967, 9 So. 916, 26 Am. St. Rep. 200; *Thomas v. Bowen*, 29 Ore. 258, 45 Pac. 768. A statute provided that in libel the plaintiff should only recover the actual

damages alleged and proved unless he proved malice in fact, or a refusal to retract on request so to do. It was held that the statute by *malice in fact* did not mean personal ill will, malignity or hatred, but an improper and unjustifiable motive. *Wynne v. Parsons*, 57 Conn. 73, 17 Atl. 362. 37—*Smart v. Blanchard*, 42 N. H. 137; *Lick v. Owen*, 47 Cal. 252; *Wilson v. Noonan*, 35 Wis. 321; *Wozelka v. Hettrick*, 93 N. C. 10; *Taylor v. Hearst*, 118 Cal. 366, 50 Pac. 541; see *ante*, p. 419, n. 25.

38—*Casey v. Hulan*, 118 Ind. 590, 21 N. E. 322; *Rausch v. Anderson*, 75 Ill. App. 526; *Freeman v. Sanderson*, 123 Ind. 264, 24 N. E. 239; *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4; *Fredrickson v. Johnson*, 60 Minn. 337, 62 N. W. 388; *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123.

39—*Noeninger v. Vogt*, 88 Mo. 589; *Reitan v. Goebel*, 33 Minn. 151; *Ward v. Dick*, 47 Conn. 300; *Westerfield v. Scripps*, 119 Cal. 607, 51 Pac. 958; *Gaines v. Gaines*, 109 Ill. App. 226; *Bailey v. Bailey*, 94 Ia. 598, 63 N. W. 341; *Conant v. Leslie*, 85 Me. 257, 27 Atl. 147; *Davis v. Starrett*, 97 Me. 568, 55 Atl. 516; *Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500.

parties.⁴⁰ Proof of the publication of similar words, it is held, should be limited to such as have reference to the defamation for which the suit is brought,⁴¹ and which do not form the basis of a pending suit.⁴² "The sounder rule appears to us to be," says the court in the case cited, "to limit the admissibility to other words or writings not in themselves actionable,⁴³ or to those for which damages have already been recovered."⁴⁴ Letters written by the defendant to the plaintiff containing language similar to that charged are admissible to show malice, though not published.⁴⁵ A plea of justification not proven is evidence of express malice.⁴⁶

*PRIVILEGED CASES.

[*246]

There are some cases, however, in which the existence of malice, or of such recklessness or negligence as in other branches of the law is received as the equivalent of malice, is absolutely essential to the action. This will be readily understood when the fact is called to the mind that the law of slander and libel concerns the administration of justice in all its departments, and has much to do with the discussion of public affairs in the journals of the day and otherwise, and with all public transactions. A question of defamation is therefore not always a question merely of private scandal; it may, on the other hand, in-

40—*Davis v. Starrett*, 97 Me. 568, 55 Atl. 516. Failure to publish a retraction promptly is evidence of malice. *Hermann v. Bradstreet Co.*, 19 Mo. App. 227. *Contra*, *Bradley v. Cramer*, 66 Wis. 297. If a statement is *prima facie* privileged, malice is not shown by the fact the speaker evinced indignation, nor by the fact that accidentally persons heard it as to whom it was not a privileged communication. Nor by an unprivileged repetition with good motives. *Fahr v. Hayes*, 50 N. J. L. 275, 13 Atl. 261.

41—*Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500.

42—Ibid.

43—Citing *De Fries v. Davis*, 7 C. & P. 112; *Bodwell v. Swan*, 3 Pick. 376.

44—Citing *Symmons v. Blake*, 1 M. & Rob. 477; *Pearce v. Ornsby*, 1 M. & Rob. 455. And see *Conant v. Leslie*, 85 Me. 257, 27 Atl. 147.

45—*Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500.

46—*Coffin v. Brown*, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732; *ante*, p. 418, n. 24.

volve questions of the highest public importance. The forms of defamation are numerous and varied. A man may be defamed by an unjust removal from office on unfounded charges; by injurious testimony given in courts of justice; by the unwarranted deductions of counsel in presenting his case adversely to the jury, and in many other ways where, notwithstanding, the agent in the injury was wholly free from legal fault. Thus, a great public character may, perhaps, suffer in reputation all his life time from an impeachment for an offense never in fact committed; yet if the impeachment was instituted in good faith, and on grounds apparently sufficient, those concerned in it only performed a public duty. We unhesitatingly recognize the fact that in many cases, however damaging it may be to individuals, there should and must be legal immunity for free speaking, and that justice and the cause of good government would suffer if it were otherwise. With duty often comes a responsibility to speak openly and act fearlessly, let the consequences be what they may; and the party upon whom the

duty was imposed must be left accountable to conscience [*247] alone, or perhaps to a supervising *public sentiment,

but not to the courts. What would be the condition of the witness, for instance, were he under the necessity of calculating, when giving his testimony, not merely whether it satisfied his conscience, but also whether he could prove it to be true should he be sued for slander in giving it? It is beyond doubt, that to subject him to such responsibility would at least detract largely from the reliability of evidence and multiply the opportunities for operating upon the fears of witnesses to the serious detriment of justice.⁴⁷

The difficulties in some of these cases are taken notice of by the law, and are provided against as far as is possible by the rule that the person whose duty it is to speak shall be privileged to speak freely. The reasons for giving him protection, however, are not the same in all cases; in some they seem to be con-

47—The doctrine of privileged of Commerce, 20 Wash. 552, 56 communication rests on public Pac. 376.
policy. *Abbott v. National Bank*

clusive and absolute; in others they operate with less force and with less conclusiveness; and the differences have not been overlooked in the classification of cases which has been made by the authorities.

This classification may be given as follows:

1. Cases absolutely privileged, so that no action will lie, even though it be averred that the injurious publication was both false and malicious.

2. Cases privileged, but only to this extent: that the circumstances are held to preclude any presumption of malice, but still leave the party responsible if both falsehood and malice are affirmatively shown.⁴⁸

Cases of Absolute Privilege. Of the cases absolutely protected, that of the witness in judicial proceedings has already been alluded to. No action will lie against him at the suit of the party injured by his false testimony, even though malice be charged; but he must be left to be dealt with by the criminal law.⁴⁹ The rule assumes, however, that he will not wander *from the case in giving his testimony, and [*248] abuse his privilege by testifying to that which is impertinent and immaterial, and which has not been called out by

48—See *Buisson v. Huard*, 106 La. 768, 31 So. 293, 56 L. R. A. 296; *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775. The burden of showing malice is on the plaintiff, and if defendant honestly believed the facts stated to be true, he will not be deprived of his privilege because he had not reasonable grounds for his belief. *Clark v. Molyneux*, L. R. 3 Q. B. D. 237, and see *Odgers on Libel and Slander*, p. 277, cases.

49—*Revis v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, 4 H. & N. 569; *Seaman v. Nethercliff*, 1 C. P. Div. 540; affirmed on appeal, 2 C. P. D. 53; *Marsh v. Ellsworth*, 50 N. Y. 309; *Terry v.*

Fellows, 21 La. Ann. 375; *Smith v. Howard*, 28 Iowa, 51; *Liles v. Gaster*, 42 Ohio St. 631; *Hutchinson v. Lewis*, 75 Ind. 55; *Chambliss v. Blau*, 127 Ala. 86, 28 So. 602; *McDavitt v. Boyer*, 169 Ill. 475, 48 N. E. 317; *Fagan v. Frier*, 30 Ill. App. 236; *McNabb v. Neal*, 88 Ill. App. 571; *Hunkel v. Voneiff*, 69 Md. 179, 17 Atl. 1056, 9 Am. St. Rep. 413; *Laing v. Mitten*, 185 Mass. 233, 70 N. E. 128; *Acre v. Starkweather*, 118 Mich. 214, 76 N. W. 379; *Cooper v. Phipps*, 24 Ore. 357, 33 Pac. 985.

What a witness says in testimony is privileged, even if the court attempted to stop him, provided he had a right to say it as

questions of counsel.⁵⁰ The case of jurors speaking freely to their fellows in the consultations of the jury-room, concerning the proper subject-matter of their deliberations, is one of like protection.⁵¹ The case of the party presenting his case to court or jury, or of counsel standing in his place doing the same, is also one of absolute privilege.⁵² Says Chief Justice SHAW:

an explanatory part of an answer he had made. *Seaman v. Netherclift*, 1 C. P. Div. 540; *S. C. 18 Moak*, 176.

It has been held, however, that one not a party to a suit may have an action against another also not a party, for suborning witnesses to testify falsely in that action, whereby his character was defamed. *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279. In other cases it has been held that such a suit would not lie by a party to the action, because it would be in effect to overhaul the merits of an action already conclusively tried as between the parties. *Bostwick v. Lewis*, 2 Day, 447; *Smith v. Lewis*, 3 Johns. 157; *Dunlap v. Glidden*, 31 Me. 435, 52 Am. Dec. 625.

The privilege of the witness is held to extend to statements made to the party and his solicitor in preparing the case for trial. *Watson v. McEwan*, (1905) A. C. 480.

50—*White v. Carroll*, 42 N. Y. 161, 1 Am. Rep. 504; *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738; *Kidder v. Parkhurst*, 3 Allen, 393; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442; *Shodden v. McElwee*, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821; *Laing v. Mitten*, 185 Mass. 233, 70 N. E. 128; *Clemmons v. Danforth*, 67 Vt. 617, 32

Atl. 626, 48 Am. St. Rep. 836. The words of a witness are *prima facie* privileged and the burden is on the plaintiff to show that they are not pertinent and were spoken maliciously. *Cooper v. Phipps*, 24 Ore. 357, 33 Pac. 985. Though impertinent, yet if spoken in good faith and without malice, then privileged. *Shadden v. McElwee*, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821. In *Cricelius v. Bierman*, 59 Mo. App. 513, it is held to be a question whether the witness had reasonable grounds to believe the matter pertinent and did so believe and that that is a question for the jury. In another case the test has been said to be whether they were spoken by the witness without being stopped by the court or counsel, and under the supposition that they were relevant. *Steinecke v. Marx*, 10 Mo. App. 580. In *Hunckel v. Voneiff*, 69 Md. 179, 17 Atl. 1056, 9 Am. St. Rep. 413, the testimony of a witness is held to be absolutely privileged, whether pertinent or responsive or not, and though false and malicious. The privilege in any case ceases as soon as the trial is over. *McDavitt v. Boyer*, 67 Ill. App. 452.

51—*Dunham v. Powers*, 42 Vt. 1; *Rector v. Smith*, 11 Iowa, 302.

52—Libelous matter in an attorney's brief, if pertinent, is ab-

“We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable themselves, are not actionable, if they are applicable and pertinent to the subject of the inquiry. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they are relevant or pertinent to the cause or subject of the inquiry. And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings *with which a party or counsel who nat- [*249] urally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the

solutely privileged. *Sickles v. Kling*, 60 App. Div. 515, 69 N. Y. S. 944. If counsel in the trial of a cause maliciously slanders a party, or witness or any other person in regard to a matter that has no reference or relation to, or connection with the case before the court, he is and ought to be answerable in an action by the party injured.” *Maulsby v. Reifsnider*, 69 Md. 143, 14 Atl. 505. But whatever utterance by counsel is pertinent is privileged though malicious. *Ibid.* The case contains a lengthy discussion of the distinction. A counsel’s statement is absolutely privileged when made in the course of a judicial proceeding, even though it be false, malicious, and irrelevant to the issue in the case, and without reasonable and probable

cause. Counsel stand on the same ground as witnesses and judges. *Munster v. Lamb*, L. R. 11 Q. B., D. 588. Unanimous opinion in the Divisional Court and in Court of Appeal.

Translating from a foreign language into the English, without malice, and for the benefit of an attorney, is privileged. *Zuckerman v. Sonnenschein*, 62 Ill. 115.

Communications between client and counsel are privileged. *Wood v. Thornly*, 58 Ill. 464.

Where an attorney prepared questions which he intended to submit to a proposed witness and had them printed, it was held that they were privileged unless manifestly immaterial, and they were held privileged in this instance. *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265.

dearest rights of such party may become involved. And if these feelings sometimes manifest themselves in strong invectives, or exaggerated expressions, beyond what the occasion would strictly justify, it is to be recollected that this is said to a judge who hears both sides, in whose mind the exaggerated statement may be at once controlled and met by evidence and argument of a contrary tendency from the other party, and who, from the impartiality of his position, will naturally give to an exaggerated assertion, not warranted by the occasion, no more weight than it deserves. Still, this privilege must be restrained by some limit, and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the cases and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not be impaired by numerous and refined distinctions."⁵³ This is a clear statement of a wise and proper general rule, with its just limitations.

The protection of the rule extends to evidence given before a military court of inquiry,⁵⁴ a legislative committee,⁵⁵ a ref-

53—*Hoar v. Wood*, 3 Met. 193. 49; *Brow v. Hathaway*, 13 Allen, 239. See, also, *Brook v. Montague*, Cro.

Jac. 90; *Hodgson v. Scarlett*, 1 B. & Ald. 232; *McMillan v. Birch*, 1 Binn. 178, 2 Am. Dec. 426; *Ring v. Wheeler*, 7 Cow. 725; *Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 330; *Mower v. Watson*, 11 Vt. 536, 34 Am. Dec. 704; *Lea v. White*, 4 Sneed, 111, 67 Am. Dec. 579; *Marshall v. Gunter*, 6 Rich. 419; *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598; *Lester v. Thurmond*, 51 Ga. 118; *Jennings v. Paine*, 4 Wis. 358; *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec.

54—*Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 255. Same Case, on appeal, 7 Eng. and Irish Appeal Cases, 744.

55—*Wright v. Lothrop*, 149 Mass. 385, 21 N. E. 963; *Goffin v. Donnelly*, L. R. 6 Q. B. D. 307. In the former case it is said that pertinent answers to questions put by the committee or by counsel are absolutely privileged; and also all volunteered statements which are pertinent to the investigation or inquiry, and which

erec,⁵⁶ or upon a hearing before a board of trustees upon charges preferred,⁵⁷ and in other like proceedings.⁵⁸ Where a city charter provided for the reference of matters to a committee for investigation and authorized the chairman of the committee to issue subpoenas and to swear witnesses, it was held that such an investigation was not a judicial or quasi judicial proceeding and that the occasion was one of conditional and not of absolute privilege.⁵⁹ It was further held in the same case that any statement made by a witness before such a committee in good faith and without malice would be privileged, whether he appeared voluntarily or under compulsion, whether in response to questions or otherwise, and though the statement had reference to a matter which had not been referred to the committee but which it had assumed to investigate and was in fact investigating.⁶⁰

are made in good faith and without malice.

56—*Nissen v. Cramer*, 104 N. C. 574, 10 S. E. 676, 6 Am. St. Rep. 780.

57—*Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931.

58—*Barratt v. Kearns*, (1905) 1 K. B. 504. A court, in admitting attorneys to the bar, acts in a judicial capacity and a letter addressed to it and protesting against the admission of a candidate upon grounds which involve libelous charges, is absolutely privileged. *Wilson v. Whitacre*, 4 Ohio C. C. 15. And where upon an inquiry as to whether a person should be committed as a dipsomaniac, an inebriate or insane, the certificate of two physicians was required, in addition to other evidence, it was held that the certificate was entitled to the same privilege as the testimony of a witness in court. *Niven v. Boland*, 177 Mass. 11, 58 N. E. 282, 52 L. R. A. 786. The court says:

"And we think that the privilege which attaches to parties and witnesses in other judicial proceedings, to parties instituting criminal proceedings, and to cases of privileged communications, should attach to examining physicians in cases like the present, and that so long as they act in good faith and without malice they should be exempt from liability. It is more important that the administration of the law in the manner provided should not be obstructed by the fears of physicians that they may render themselves liable to suit, than it is that the person certified by them to be insane or a dipsomaniac or inebriate should have a right of action in case it turns out that the certificate ought not to have been given." p. 14.

59—*Blakeslee v. Carroll*, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106.

60—The court says: "If the defendant, present before the com-

[*250] *A legislator has a protection which is even more complete and absolute, because, in his case, it is not permitted to question elsewhere what he may have said in speech or debate, except for the purposes of political redress in elections. It is customary in the American constitutions to declare this exemption from responsibility in positive terms; but it exists independent of such a declaration as a necessary principle in free government; and this has been recognized ever since the case of the six members, whom an attempt was made to arrest and punish for their action in Parliament in the time of Charles the First. It is not permissible in the case of legislators, to raise the question whether what they may have said or written was or was not pertinent to what was before them for official action; it is enough that at the time they were acting as legislators, either at the sessions of the House of which they were members, or upon one of its committees.⁶¹ Whether a like privilege would be conceded to members of inferior bodies, possessing certain legislative functions, such as city councils, boards of supervisors, etc., is not so clear. Undoubtedly they would be privileged; but they occupy a somewhat different position from legislators proper. The latter constitute an independent department of the government, and as such are not subject to judicial supervision and control, and their judgment of what their duty requires them to say should be conclusive. But the members of

mittee as a witness or otherwise, was invited or permitted or called upon to make a statement by the committee, for their information, of matters pertinent and relevant to the investigation they were then actually conducting and apparently within their power, we think the mere fact that the words uttered were not in response to questions does not avoid the privilege. The law regards substance and not form in matters of this kind; it regards what was said and the motives for saying it, rather than the precise

form of statement. Of course the fact that a statement was officiously volunteered would be evidence to go to the jury upon the question of express malice, but that is quite another matter." *Blakeslee v. Carroll*, 64 Conn. 223, 239, 29 Atl. 473, 25 L. R. A. 106. And see *Meteye v. Times-Democrat Pub. Co.*, 47 La. Ann. 824, 17 So. 314; *McLaughlin v. Charles*, 60 Hun, 239, 14 N. Y. S. 608.

61—*Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189; *State v. Burnham*, 9 N. H. 34; *Perkins v. Mitchell*, 31 Barb. 461.

these inferior bodies have no such independent powers, and are sufficiently protected if the law exempts them from responsibility for whatever is said by them which is pertinent to any inquiry or investigation pending or proposed before them, but leaves them accountable when they wander from the subject in hand to assail others.

The proceedings of common councils, county boards and other like bodies are only conditionally privileged.⁶² What is said by members of such bodies while in session, in good faith in reference to business or questions pending and under consideration, is privileged.⁶³ Remarks volunteered when no motion or other business is pending are held not to be privileged.⁶⁴ The passage of a resolution outside the duty or province of such a body is not privileged.⁶⁵ An unnecessary and libelous preamble attached to a proper resolution was held to render the members liable.⁶⁶ A veto message of a mayor to his city council was held absolutely privileged, as to all pertinent matter.⁶⁷ Proceedings at a town meeting are in the same category as those of councils, and the like. What is said at such meetings in reference to matters under consideration, is conditionally privileged.⁶⁸

The executive of the nation and the governors of the several States are exempt from responsibility to individuals for their official utterances. So are all judges of courts and judicial officers, while acting within the limits of their jurisdiction.⁶⁹

62—*Blakeslee v. Carroll*, 64 Co., 74 Minn. 84, 76 N. W. 961, Conn. 223, 29 Atl. 473, 25 L. R. A. 73 Am. St. Rep. 330.

106; *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981; *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853; *Pittard v. Oliver*, (1891) 1 Q. B. 474; *Royal Aquarium, etc., Soc. v. Parkinson*, (1892) 1 Q. B. 431.

63—Ibid.

64—*Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; *McGaw v. Hamilton*, 184 Pa. St. 108, 39 Atl. 4.

65—*Treffy v. Transcript Pub.*

66—*Mauk v. Brundage*, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477.

67—*Trebilcock v. Anderson*, 117 Mich. 39, 75 N. W. 129. In *Greenword v. Colby*, 26 Neb. 449, 42 N. W. 413, a communication by the mayor to the council is impliedly held to be only conditionally privileged.

68—*Bradford v. Clark*, 90 Me. 298, 38 Atl. 229.

69—*Townshend on Slander and*

[*251] *The pleadings and other papers filed by parties in the course of judicial proceedings, are privileged, so long as they do not wander from what is material to libel parties.⁷⁰ So are affidavits made for commencing proceedings before magistrates, and the preliminary proceedings and information taken or given for bringing supposed guilty parties to justice.⁷¹ The general rule may be stated to be that pertinent matter in pleadings, motions, affidavits and other papers in any judicial proceeding, is absolutely privileged, though false and malicious, but that matter which is clearly impertinent and irrelevant and also false and malicious, is actionable.⁷² "All charges, allegations

Libel, § 227; *Scott v. Stansfield*, L. R. 3 Exch. 220. If an alleged libel is a part of a justice's return, it is privileged whether his motive was good or bad, if the return is made under a belief, though erroneous, that the matter was relevant. *Aylesworth v. St. John*, 25 Hun, 156.

70—*Astley v. Younge*, 1 Burr. 807; *Henderson v. Broomhead*, 4 H. & N. 570; *Wyatt v. Buell*, 47 Cal. 624; *Vausse v. Lee*, 1 Hill (S. C.), 197, 26 Am. Dec. 168; *Lea v. White*, 4 Sneed, 111; *Garr v. Selden*, 4 N. Y. 91; *Hardin v. Cumstock*, 2 A. K. Marsh, 480, 12 Am. Dec. 427; *Strauss v. Meyer*, 48 Ill. 385; *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Vinas v. Merch., &c., Co.*, 33 La. Ann. 1265; *McLaughlin v. Cowley*, 127 Mass. 316; 131 Mass. 70; *Prescott v. Tousey*, 53 N. Y. Sup. Ct. 56; though the complaint is dismissed, *Dada v. Piper*, 41 Hun, 254. A petition alleging misconduct in office filed by a receiver against his co-receiver in the action in which they were appointed is privileged. *Bartlett v. Reifsnider*, 69 Md. 219, 14 Atl. 518. A bill in chancery pre-

pared by counsel and sworn to, but never filed, is privileged. *Burnham v. Roberts*, 70 Ill. 19.

71—*Allen v. Crofoot*, 2 Wend. 515, 20 Am. Dec. 647; *Hartock v. Reddick*, 6 Blackf. 255; *Briggs v. Byrd*, 12 Ired. 377. See *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Rep. 736; *Eames v. Whitaker*, 123 Mass. 342; *Burke v. Ryan*, 36 La. Ann. 951; *Graham v. Cass Circuit Judge*, 108 Mich. 425, 66 N. W. 348. But see *Kelly v. Lafitte*, 28 La. Ann. 435. So an affidavit that a constable is unfit to select a jury. *Rainbow v. Benson*, 71 Ia. 301, 32 N. W. 352. In *Pierce v. Sard*, 23 Neb. 828, 37 N. W. 677, it is held that to render privileged statements made to a magistrate charging a crime they must be based on reasonable and probable cause.

72—*Harlow v. Carroll*, 6 App. D. C. 128; *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 234; *Conley v. Key*, 98 Ga. 115, 25 S. E. 914; *Gaines v. Aetna Ins. Co.*, 104 Ky. 695, 47 S. W. 884; *Ash v. Zwietusch*, 159 Ill. 455, 42 N. E. 854; *Roll v. Donnelly*, 56 Ill. App. 425; *Burdette v. Argile*, 94 Ill. App. 171;

and averments contained in regular pleadings addressed to and filed in a court of competent jurisdiction, which are pertinent or material to the redress or relief sought, whether legally sufficient to obtain it or not, are absolutely privileged. However false and malicious, they are not libelous. This privilege rests on public policy which allows all suitors (however bold and wicked, however virtuous and timid) to secure access to the tribunals of justice with whatever complaint, true or false, real or fictitious, they choose to present, provided only it be such as the court whose jurisdiction is invoked has power to entertain and adjudicate."⁷³

In one case it is said that, in order to render matter privileged within the rule, "it is perhaps not necessary that it be in all cases material to the issues presented by the pleadings, but it must be legitimately related thereto, or so pertinent to the subject of the controversy that it may, in course of the trial, become the subject of inquiry."⁷⁴ Whether matter is pertinent is a question for the court,⁷⁵ and, in determining the question, no strained, technical or close construction will be indulged in to

Hawk v. Evans, 76 Ia. 593, 41 N. 32 N. Y. S. 461; *Crockett v. Mc-*
W. 368, 14 Am. St. Rep. 247; *Lanahan*, 109 Tenn. 517, 72 S. W.
Weil v. Israel, 42 La. Ann. 955, 950, 61 L. R. A. 914; *Abbott v.*
 8 So. 826; *Randall v. Hamilton*, 45 National Bank of Commerce, 20
 La. Ann. 1184, 14 So. 73, 22 Wash. 552, 56 Pac. 376; *Union*
 L. R. A. 649; *Wimbish v. Hamil-* Mut. Life Ins. Co. *v. Thomas*, 83
 ton, 47 La. Ann. 246, 16 So. 856; Fed. 803, 28 C. C. A. 96; *McGehee*
Gardemal v. McWilliams, 43 La. *v. Insurance Co.*, 112 Fed. 853, 50
 Ann. 454, 9 So. 106, 26 Am. St. C. C. A. 551; and cases cited in
 Rep. 195; *Bartlett v. Christhilf*, last two notes. Compare *Randall*
 69 Md. 219, 14 Am. St. *v. Hamilton*, 45 La. Ann. 1184, 14
 518; *Hartung v. Shaw*, 130 So. 73, 22 L. R. A. 649; *Wimbish*
Mich. 177, 89 N. W. 701; *Sherwood v. Hamilton*, 47 La. Ann. 246, 16
v. Powell, 61 Minn. 479, 63 N. W. So. 856.

1103, 52 Am. St. Rep. 614, 29 L. 73—*Wilson v. Sullivan*, 81 Ga.
R. A. 153; *Hyde v. McCabe*, 100 238, 243, 244, 7 S. E. 234.

Mo. 412, 13 S. W. 875; *Jones v.* 74—*Union Mut. Life Ins. Co. v.*
Brownlee, 161 Mo. 258, 61 S. W. *Thomas*, 83 Fed. 803, 804, 28 C. C.
 795, 53 L. R. A. 445; *Moore v.* A. 96.

Manufacturers' Nat. Bank, 123 N. 75—*Jones v. Brownlee*, 161 Mo.
 Y. 420, 25 N. E. 1048, 11 L. R. A. 258, 61 S. W. 795, 53 L. R. A.
 753; *Link v. Moore*, 84 Hun, 118, 445.

deprive the defendant of the protection of privilege.⁷⁶ The rule extends to the pleadings in proceedings before the Interstate Commerce Commission.⁷⁷

Cases Conditionally Privileged. The cases only conditionally privileged are those in which the utterance or publication is on a lawful occasion, which fully protects it, unless the occasion has been abused to gratify malice or ill will. A petition to the executive, or other appointing power, in favor of an applicant for an office, or a remonstrance against such an applicant, is a publication thus privileged. No action will lie for false statements contained in it, unless it be shown that it was both false and malicious.⁷⁹ And this rule will apply to petitions, applications and remonstrances of all sorts addressed by the citizen to any officer or official body, asking what such officer or body may lawfully grant, or remonstrating against anything which it might lawfully withhold. It is a necessary part of the right of petition that such papers, presented in good [*252] *faith should be protected.⁸⁰ And it is privileged

76—*Gardemal v. McWilliams*, 43 La. Ann. 454, 9 So. 106, 26 Am. St. Rep. 195; *Moore v. Manufacturers' Nat. Bank*, 123 N. Y. 420, 426, 25 N. E. 1048, 11 L. R. A. 753. In *Burdette v. Argile*, 94 Ill. App. 171, it is implied that if the defendant in good faith believes the matter material and pertinent there is no malice and consequently no liability.

77—*Duncan v. Atchison, &c., R. R. Co.*, 72 Fed. 808, 19 C. C. A. 202.

79—*Thorn v. Blanchard*, 5 Johns. 508; *Bodwell v. Osgood*, 3 Pick. 379, 15 Am. Dec. 229; *Harris v. Huntington*, 2 Tyler, 129, 4 Am. Dec. 728; *Gray v. Pentland*, 2 S. & R. 23; *Larkin v. Noonan*, 19 Wis. 82; *Whitney v. Allen*, 62 Ill. 472; *Vanarsdale v. Laverty*, 69 Pa. St. 103; *Dennehy v. O'Con-*

nell, 66 Conn. 175, 33 Atl. 920; *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775; *Nolan v. Kane*, 13 Ohio C. C. 485; *Posnett v. Marble*, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162.

80—*Lake v. King*, 1 Lev. 240; *Reid v. DeLorme*, 2 Brev. 76; *Thorn v. Blanchard*, 5 Johns. 508; *Vanarsdale v. Laverty*, 69 Pa. St. 103; *Venderzee v. McGregor*, 12 Wend. 545; *Howard v. Thompson*, 21 Wend. 319, 34 Am. Dec. 238; *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418; *Finley v. Steele*, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852; *Woods v. Wieman*, 47 Hun. 362; *Coloney v. Farrow*, 5 App. Div. 607, 39 N. Y. S. 460; *Kent v. Bougartz*, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep.

while being circulated as well as after it is presented.⁸¹ All official communications made by an officer in the discharge of a public duty are under the like protection.⁸² In some cases these latter communications are held to be absolutely privileged.⁸³ A report of a committee appointed by a town meeting is condition-

870. A complaint by a citizen to the board of health of the neglect of the garbage contractor to do his work falls in the same category. *Sothern Chemical, &c., Co. v. Wolf*, 48 La. Ann. 631, 19 So. 558. Where the Privy Council, in removing an officer, is not acting judicially, a letter to it charging him with irregularity, is not absolutely privileged. *Proctor v. Webster*, L. R. 16 Q. B. D. 112.

81—*Venderzee v. McGregor*, 12 Wend. 545; *Streety v. Wood*, 15 Barb. 105. But it must be addressed to the authority having power to give the relief asked. *Fairman v. Ives*, 5 B. & Ald. 642; *Hosmer v. Loveland*, 19 Barb. 111. See *Milam v. Burnside*, 1 Brev. 295. And a paper which assumes the form of a petition, but is never presented, or meant to be, has no protection. *State v. Burnham*, 9 N. H. 34.

82—*De Arnaud v. Ainsworth*, 24 App. Cas. D. C. 167; *Billet v. Times-Democrat Pub. Co.*, 107 La. 751, 32 So. 17, 58 L. R. A. 62; *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; *Stevenson v. Ward*, 48 App. Div. 291, 62 N. Y. S. 717; *Maurice v. Worden*, 52 Md. 283; *Dewe v. Waterbury*, 6 Can. S. C. R. 143; *In re Inv. Comm.*, 16 R. I. 751, 11 Atl. 429. So communications in prosecuting an inquiry as to a crime for the purpose of detecting the criminal. *Eames v. Whittaker*,

123 Mass. 342. Statements made by patron of a school to the trustees, charging bad character in one of the teachers, are privileged. *Harwood v. Keech*, 4 Hun, 389; *Wieman v. Mabee*, 45 Mich. 484, 40 Am. Rep. 477; *Decker v. Gaylord*, 35 Hun, 584. The privileged cases of this class are well enumerated by EMMETT, J., in *Perkins v. Mitchell*, 31 Barb. 461, 467. And see, *Hart v. Von Gumpach*, L. R. 4 Priv. Council, 439; *S. C. 4 Moak*, 138. The communication of the principal of a public institution to the trustees of charges of immorality in a subordinate is privileged. *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; *Halstead v. Nelson*, 36 Hun, 149. And, see, *O'Connor v. Sill*, 60 Mich. 175.

83—*Catterton v. Secretary of State for India*, (1895) 2 Q. B. 189; *De Arnaud v. Ainsworth*, 24 App. Cas. D. C. 167. In the last case the court says: "The question of motive, or whether there was a want of good faith on the part of the defendant, in the making of the report, is not a material question in the case. A party is not liable for the motives with which he discharges an official duty; nor is he liable for any mistake of fact he may commit in the course of the exercise of that duty. Public policy affords absolute protection and immunity for what may be said or written

ally privileged.⁸⁴ So of information given to a magistrate or police officer concerning a crime or supposed crime committed.⁸⁵ So are all communications by members of corporate bodies, churches and other voluntary societies, addressed to the body or any official thereof, and stating facts, which, if true, it is proper should be thus communicated.⁸⁶

[*253] ***Cases Privileged on Individual Reasons.** Other cases have an aspect less important in the public considerations that bear upon them, but are still entitled to the same privilege,

by an officer in his official report or communication to a superior, when such communication is made in the course and discharge of official duty. Otherwise the perfect freedom which ought to exist in the discharge of public duty might be seriously restrained, and often to the detriment of the public service." citing *Spaulding v. Vilas*, 161 U. S. 483, 16 S. C. Rep. 631.

84—*Howland v. Flood*, 160 Mass. 509, 36 N. E. 482. But what an official says at a public meeting of citizens in justification of his action is not privileged. *Rausch v. Anderson*, 75 Ill. App. 526.

85—*Garn v. Lockard*, 108 Mich. 196, 65 N. W. 764; *Shinglemeyer v. Wright*, 124 Mich. 231, 82 N. W. 887, 50 L. R. A. 129; *Pierce v. Oard*, 23 Neb. 828, 37 N. W. 677; *Eames v. Whittaker*, 123 Mass. 342. But see *Arnold v. Savings Co.*, 76 Mo. App. 159; *Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205.

86—*Hershaw v. Bailey*, 1 Exch. 743; *Farnsworth v. Storrs*, 5 Cush. 412; *Chapman v. Calder*, 14 Pa. St. 365; *O'Donaghue v. McGovern*, 23 Wend. 26; *Haight v. Cornell*, 15 Conn. 74; *Servatius v. Pichel*, 34 Wis. 292; *Streety v.*

Wood, 15 Barb. 105; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236; *Howard v. Dickie*, 120 Mich. 238, 79 N. W. 191; *Piper v. Woolman*, 43 Neb. 280, 61 N. W. 588; *Cranfill v. Hayden*, 97 Tex. 544, 80 S. W. 609. That pertinent statements, made at a town meeting, are privileged, see *Smith v. Higgins*, 16 Gray, 251; *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. Rep. 316. An affidavit as to the credibility of a witness at a trial before a masonic lodge is not privileged where neither witness for affiant are lodge members. *Nix v. Caldwell*, 81 Ky. 293, 50 Am. Rep. 169. Communications between members of the same church in the course of church discipline are privileged. *Jarvis v. Hathway*, 3 Johns. 180, 3 Am. Dec. 473; *Smith v. Youmans*, 3 Hill (S. C.) 85; *York v. Pease*, 2 Gray, 282; *Lucas v. Case*, 9 Bush, 297; *Landis v. Campbell*, 79 Mo. 433, 49 Am. Rep. 239. Over *v. Hildebrand*, 92 Ind. 19. As to what are privileged statements and communications in church discipline, see *Farnsworth v. Storrs*, 5 Cush. 412; *Servatius v. Pichel*, 34 Wis. 292. A bishop's charge to his clergy is privileged. Laugh-

because a like duty demands the same freedom of speech, though the communication may concern only the person to whom it is addressed and the person concerning whom it is made.⁸⁷ As an illustration the case may be taken of the father who discusses with his daughter the character, habits, reputation and abilities of one who has sought her hand in marriage. In such a case it is plain that not only ought the discussion to be privileged, but that the father ought to be at liberty to speak not merely what he knows, but what he believes and suspects.⁸⁸ To require him at his peril to keep strictly within the limits of what he could prove to be

ton *v.* Bishop of Sodor & Man, L. R. 11 Q. B. D. 43.
 R. 4 Priv. Council, 495 S. C. 4 Moak, 162.

A member of an association of ministers made charges against another member of unministerial conduct, which were by order of the association published in certain denominational papers. *Held*, that the person's action before the association and the publication which followed the action of the association were conditionally privileged. *Shurtleff v. Stevens*, 51 Vt. 501. But a letter to a member of such association with reference to another member, written by one not a member, is not privileged. *Shurtleff v. Parker*, 130 Mass. 293. A circulation of false statements about a clergyman by a member of his parish outside of the church and not to the church authorities is not privileged. *State v. Bienvenu*, 36 La. Ann. 378.

87—A communication privileged as between the sender and receiver, may lose the privilege, if sent unnecessarily by postal card or postal telegram. *Williamson v. Freer*, L. R. 9 C. P. 393; S. C. 10 Moak. 225. But not if sent by mistake to, and read by another.

88—*Todd v. Hawkins*, 8 C. and P. 88. See *Joannes v. Bennett*, 5 Allen, 170. Reports by one employed by a father to ascertain the standing of his daughter's husband, made to the father and mother, are privileged. *Atwill v. Mackintosh*, 120 Mass. 177; *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992. In the last case a father, to whose daughter the plaintiff was engaged, requested the defendant, a physician, to examine the plaintiff for venereal disease. The defendant did so and reported that the plaintiff had such disease, in consequence of which the engagement was broken off. The plaintiff brought suit for slander, conspiracy and negligence. The jury found that the plaintiff did not have the disease. The court held that the report was privileged and, if without malice, slander would not lie, but that if defendant was negligent in making the examination and report he would be liable on that ground. Friendship alone will not warrant a communication to a woman about her suitor unless it be in reply to a request for

true, would be to make no allowance for the confidence properly belonging to the relation, or for the agitation and alarm which paternal feelings would naturally experience when an alliance believed to be improper was proposed. The case suggested is one of a large class of cases in which the like privilege is allowed and in which it is necessary to show not only that the communication was false, but also that it was made with evil intent.⁸⁹

Confidential communications between one and his professional [*254] adviser, whether legal, medical, or spiritual, should be and are shielded with the same protection.⁹⁰

such information. *Byam v. Collins*, 39 Hun, 204; *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129. Here the defendant voluntarily wrote a letter to the woman, warning her against the plaintiff and repeating various rumors and gossip concerning him. In its opinion holding that the letter was not privileged, the court of appeals said: "The rule as to privileged communications should not be so extended as to open wide the flood-gates of injurious gossip and defamation by which private character may be overwhelmed and irreparable mischief done, and yet it should be so administered as to give reasonable protection to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty. Everyone owes a moral duty, not, as a volunteer in a matter in which he has no legal duty or personal interest, to defame another unless he can find a justification in some pressing emergency. (p. 151).

* * * One may not go about in the community and, acting upon mere rumors, proclaim to every-

body the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them currency that the victim of them may be avoided; and, ordinarily, one cannot with safety, however free he may be from actual malice, as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. (p. 152).

* * * But a mere volunteer having no duty to perform, no interest to subserve, interferes with the relation between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation, but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true." (p. 156).

89—See *Boyssett v. Hire*, 49 La. Ann. 904, 22 So. 44, 62 Am. St. Rep. 675.

90—But there is no privilege to a priest in making charges against members of his congregation in

So are confidential communications between a principal and his agent in any matter connected with the business.⁹¹ And where confidential inquiries are made concerning the character and conduct of servants, or the responsibility of tradesmen, and the like, by one having an interest in knowing, and of one who may be supposed to have had special opportunity in his own dealings or affairs to acquire the information, the answers are in like manner privileged.⁹² If one makes it his business to *furnish information concerning the character, habits, [*255] standing and responsibility of tradesmen, in response to inquiries from those who have a special interest in knowing these

relation to their business from the pulpit. *Fitzgerald v. Robinson*, 112 Mass. 371. Nor is there any privilege to a stranger who interferes in negotiations of marriage, though there would be to a near relative. *Joannes v. Bennett*, 5 Allen, 170. Compare *Coxhead v. Richards*, 2 M. G. & S. 569; *Bennett v. Deacon*, Id. 628.

91—*Washburn v. Cooke*, 3 Denio, 110; *Knowles v. Peck*, 42 Conn. 386, 19 Am. Rep. 542; *Nichols v. Eaton*, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483. Communications by a bank to its correspondent come under this rule. *Caldwell v. Story*, 107 Ky. 10, 52 S. W. 850, 45 L. R. A. 735; *Haft v. First Nat. Bank*, 19 App. Div. 423, 46 N. Y. S. 481. So are those between a patron of a school and the trustees concerning the character of a teacher, *Harwood v. Keech*, 4 Hun, 389; and see cases p. 435, n. 82, *supra*. So one whose house has been set on fire may communicate to his family his suspicions as to the incendiary. *Campbell v. Bannister*, 79 Ky. 205. The owner of a building which has been set on fire may caution

persons in the building against particular persons suspected of being the incendiaries. *Lawler v. Earle*, 5 Allen 22. The landlord may caution the tenant respecting the character of sub-tenants. *Knight v. Gibbs*, 3 Nev. & Man. 469; S. C. 1 A. & E. 43.

92—*Pattison v. Jones*, 8 B. & C. 578; *Storey v. Challands*, 8 C. & P. 234; *Dunman v. Bigg*, 1 Camp, 269, note; *Amann v. Damm*, 8 C. B. (N. S.) 597; *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418; *Elam v. Badger*, 23 Ill. 498; *White v. Nichols*, 3 How. 266; *Lewis v. Chapman*, 16 N. Y. 375; *Fowles v. Bowen*, 30 N. Y. 20; *Noonan v. Orton*, 32 Wis. 106; *Hatch v. Lane*, 105 Mass. 394; *Atwill v. Mackintosh*, 120 Mass. 177; *Fahr v. Hayes*, 50 N. J. L. 275, 13 Atl. 761; *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387. So in answer to inquiries of a mother, to charge her minor child with stealing. *Long v. Peters*, 47 Ia. 239. So statement of investigating officer as to worthiness of poor person to one interested in aiding such person. *Waller v. Loch*, L. R. 7 Q. B. D. 619. One

facts, his business is privileged.⁹³ But if he sends such information to all who engage his services, without regard to their special interest in any particular case, his business is not privileged,

who believes himself possessed of knowledge which if true may affect the rights of another has the right in good faith to communicate such belief voluntarily. Here a servant of a vendor informed the vendee of cattle of the vendor's fraud. *Mott v. Dawson*, 46 Ia. 533. So where the plaintiff, a former employe of the defendant, was about to enter the employ of another, and the defendant voluntarily told the latter that plaintiff had stolen money from him. *Fresh v. Cutter*, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67. So where statements were made to a church officer as to character of a curate. *Clark v. Molyneux*, L. R. 3 Q. B. D. 237. A letter volunteering to an employer information of his servant's untrustworthiness is not privileged when sent to effect the writer's purpose and not to give the employer in good faith information necessary to protect him from a knave. *Over v. Schiffing*, 102 Ind. 191. The directors of a society for promoting female medical education, may, in a published report, caution the public against trusting a person who had formerly been employed to obtain and collect subscriptions on their behalf, but has since been dismissed, if the caution is given in good faith, and is required for the protection of the corporation and the public. *BIGELOW, J.*: "A party cannot be held responsible for a statement or publication tending to dispar-

age private character, if it is called for by the ordinary exigencies of social duty, or is necessary and proper to enable him to protect his own interest, or that of another, provided it is made in good faith and without a willful design to defame." *Gassett v. Gilbert*, 6 Gray, 94, 97, citing *Tooood v. Spying*, 1 C. M. & R. 193; *Child v. Affleck*, 9 B. & C. 403, and other cases. But where a mutual insurance company printed, in a newspaper so that the general public as well as members might see it, a false statement as to an agent, it was held liable. *Holliday v. Ont. Farmers', &c. Co.* 1 Ont. App. 483, and cases cited. Statement of reasons for discharge by the officer of a corporation to the discharged employee in the room where the question is asked is privileged if given in truth, honesty and fairness and without malice, and this though other persons were within hearing of the officer's statement and his statement charged the employee with stealing. *Beeler v. Jackson*, 64 Md. 589. See *Billings v. Fairbanks*, 136 Mass. 177; 139 Id. 66. See also on subject of privilege in notifying employees of discharge of another employee for stealing. *Bacon v. Mich. Cent. R. Co.*, 66 Mich. 166, 33 N. W. 181.

93—*Ormsby v. Douglass*, 37 N. Y. 477; *Trussell v. Scarlett*, 18 Fed. 214; *Erber v. Dun*, 12 Fed. 526. See *State v. Lonsdale*, 48 Wis. 348; *Locke v. Bradstreet Co.*,

and he must justify his reports by the truth.⁹⁴ "The mercantile agency does not stand in such relation, either of interest or duty, with its subscribers generally, that communications from it to them generally are privileged. Exceptions exist in relation to those persons who are interested in obtaining the particular information, and to whom it is furnished, on special request. To this extent, and no further, are such communications protected by a qualified privilege."⁹⁵ A reply to a newspaper attack, if made without malice and in self-defense is privileged.⁹⁶ But if the reply consists of a general attack on the plaintiff's character to show him unworthy of belief it is not privileged.^{96a}

22 Fed. Rep. 771; see also *Kingsbury v. Bradstreet Co.*, 35 Hun, 212.

94—*Taylor v. Church*, 8 N. Y. 452; *Sunderlin v. Bradstreet*, 46 N. Y. 188, 7 Am. Rep. 322; *Johnson v. Bradstreet Co.*, 77 Ga. 172, 4 Am. St. Rep. 77; *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138; *Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 762, 2 L. R. A. 405; *Douglass v. Daisley*, 114 Fed. 628, 52 C. C. A. 324; *King v. Patterson*, 49 N. J. L. 417, 9 Atl. 705. In the last case there is a full discussion and very vigorous dissent in view of modern methods of business. See, also, *Beardsley v. Tappan*, 5 Blatch. 497.

95—*Pollaskey v. Minchener*, 81 Mich. 280, 283, 284, 46 N. W. 5, 21 Am. St. Rep. 516, 9 L. R. A. 102; *Fish v. St. Louis County Printing & Pub. Co.*, 102 Mo. App. 6, 74 S. W. 641; *Myers v. Kaichen*, 75 Mich. 272, 42 N. W. 820; *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931.

96—*Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; 6 Id. 474; *Odgers on*

Libel 225 and cases cited. In the case cited it is said: "If a man is attacked in a newspaper, he may reply; and if his reply is not unnecessarily defamatory of his assailant, and is honestly made in self-defense, it will be privileged." p. 118-9. And see *Shepherd v. Baer*, 96 Md. 152, 53 Atl. 970.

96a—*Brewer v. Chase*, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397; *Smurthwaite v. News Pub. Co.*, 124 Mich. 377, 83 N. W. 116. In the former case it is said: "The law justifies a man in repelling a libelous charge by a denial or an explanation. He has a qualified privilege to answer the charge; and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, though it be false. The court will determine whether the occasion is one which justifies such publication, but the question of good faith—i. e. malice—is for the jury. It must not be supposed, that, when a libelous article is published, the

Liberty of the Press.—Its Privilege and Responsibilities.

The several State constitutions, like the federal constitution, have been careful to preserve the freedom of the press. They have not, however, undertaken to define it, and what is meant by it is not made very plain by the authorities. On one point all are agreed, namely, that the freedom of *the press implies [*256] exemption from censorship, and a right in all persons to publish what they may see fit, being responsible for the abuse of the right.⁹⁷ But whether the conductor of a public journal has any privilege above others in publishing, is not so clear. The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be, to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public are concerned. With this end in view not only must freedom of discussion be permitted, but there must be exemption afterward from liability for any publication made in good faith, and in the belief in its truth, the making of which, if true, would be justified by the occasion.⁹⁸ There should consequently be freedom in discussing, in good faith, the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for a public office, either to the electors or to a board or officer having powers of appointment.⁹⁹ As said

person libeled is at once authorized to publish any and all kinds of charges against the offender, upon the theory that they tend to degrade him, and thereby discredit his libelous statements. If this were so, every libel might be answered in this way, and the most disgraceful charges made, the person making them being able to shelter himself behind his belief in their truth. The thing published must be something in the nature of an answer, like an explanation or denial. What is said must have some connection

with the charge that is sought to be repelled." p. 532-3.

97—Story on Const. § 1889; 2 Kent, 17; Rawle on Const. Ch. 10; Cooley Const. Lim. 420; 4 Bl. Com. 151; *Commonwealth v. Blanding*, 3 Pick. 304.

98—*Bearce v. Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446.

99—*Lewis v. Few*, 5 Johns. 1; *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102; *Hunt v. Bennett*, 4 E. D. Smith, 647; S. C. 19 N. Y. 173; *Curtis v. Mussey*, 6 Gray, 261; *Aldrich v. Printing Co.*, 9 Minn. 133, 86 Am. Dec. 84; *Mayrant v.*

by the court in *Myers v. Longstaff*: "When one becomes a candidate for public office, he thereby deliberately places his conduct, character and utterances before the public for their discussion and consideration. They may be criticised by the writer or speaker, and the law will protect such writer or speaker, providing that, in their statement of or concerning the facts upon which their criticisms are based, they preserve an honest regard for the truth or their criticisms are made in good faith, and in the honest belief, after reasonable investigation, that they are true."¹ But a candidate for public office does not surrender his private character to the public and he has the same remedy for defamation as before.² And the publication of false and defamatory statements concerning him, whether relating to his private character or public acts, are not privileged.³

- Richardson*, 1 N. & McC. 348, 9 Am. Dec. 707; *Belknap v. Ball*, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72; *Dunneback v. Tribune Printing Co.*, 108 Mich. 75, 65 N. W. 583; *Martin v. Paine*, 69 Minn. 482, 72 N. W. 450; *Upton v. Hume*, 24 Ore. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493; *Wallace v. Jameson*, 179 Pa. St. 98, 36 Atl. 142; *Coates v. Wallace*, 4 Pa. Supr. Ct. 253; *Myers v. Langstaff*, 14 S. D. 98, 84 N. W. 233. See *Gathercole v. Miall*, 15 M. & W. 319; *Purcell v. Sowler*, L. R. 1 C. P. Div. 781; S. C. in Error, 2 C. P. Div. 215; *State v. Balch*, 31 Kan. 465; *Express Printing Co. v. Copeland*, 64 Tex. 354. Otherwise if the article falsely accuses the candidate of a crime. *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307. As to liability of individual citizens in like circumstances, see *Marks v. Baker*, 28 Minn. 162; *Mott v. Dawson*, 46 Ia. 533; *Bays v. Hunt*, 60 Ia. 251; *Wheaton v. Beecher*, 66 Mich. 307, 33 N. W. 503.
- 1—*Myers v. Longstaff*, 14 S. D. 98, 110, 84 N. W. 233. To same effect, *Ross v. Ward*, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746.
- 2—*Post Publishing Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921; *Upton v. Hume*, 24 Ore. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.
- 3—*State v. Keenan*, 111 Ia. 286, 82 N. W. 792; *Wheaton v. Beecher*, 66 Mich. 307, 33 N. W. 503; *Belknap v. Ball*, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72; *Eikhoff v. Gilbert*, 124 Mich. 353, 83 N. W. 110, 51 L. R. A. 451; *Smurthwaite v. News Pub. Co.*, 124 Mich. 377, 83 N. W. 116; *Martin v. Paine*, 69 Minn. 482, 72 N. W. 450; *Wallace v. Jameson*, 179 Pa. St. 98; *Knapp v. Campbell*, 14 Tex. Civ. App. 199, 36 S. W. 765; *Forke v. Homann*, 14 Tex. Civ. App. 670, 39 S. W. 210; *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772; *Post Publishing Co. v.*

The same freedom of discussion should be allowed when the character and official conduct of one holding a public office is in question, as in case of candidates for office, and in all cases where the matter discussed is one of general public interest.⁴ And the privilege is subject to like limitations.⁵

Hallam, 59 Fed. 530, 8 C. C. A. 201. In *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59, it is held that false statements as to a candidate for public office are not privileged, though made in good faith.

4—*Purcell v. Sowler*, 1 C. P. Div. 781; *Wason v. Walter*, L. R. 4 Q. B. 73; *Kelley v. Sherloch*, L. R. 1 Q. B. 686; *Kelley v. Tintling*, L. R. 1 Q. B. 699; *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605; *Miner v. Detroit, &c., Co.*, 49 Mich. 358; *Vance v. Louisville Courier Journal Co.*, 95 Ky. 41, 23 S. W. 591; *Herringer v. Ingberg*, 91 Minn. 71, 97 N. W. 460; *Myers v. Longstaff*, 14 S. D. 98, 84 N. W. 233; *Ross v. Ward*, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746. A newspaper article attacking a State Senator for his votes and attributing corrupt motives for them, is libelous *per se*. "If one goes out of his way to asperse the personal character of a public man and to ascribe to him base and corrupt motives, he must do so at his peril, and must either prove the truth of what he says or answer in damages to the party injured." *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715. "The conduct of public officers is open to public criticism, and it is for the interest of society that their acts may be freely published, with fitting comments or strictures. But a line must be drawn

between hostile criticism upon public conduct and the imputation of bad motives or criminal offenses where such motives or offenses cannot be justly and reasonably inferred from the conduct." *Neeb v. Hope*, 111 Pa. St. 145, 56 Am. Rep. 274. See *Bourreseau v. Detroit Evening Journal*, 63 Mich. 425, 30 N. W. 376; *Maclean v. Scripps*, 52 Mich. 214. A false and damaging charge, tending to ruin the professional standing of a physician, is not conditionally privileged because he is a city physician and the charge refers to his conduct as such. *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403. In general the same rules are applied to criticism by individuals upon public officers. To charge a city official with making a report upon a paving material for an illicit reward at the dictation of persons interested in the pavement, is not privileged. Official acts may be freely criticised, and entire freedom of expression used as to the act itself, and such criticism will be *prima facie* privileged. But the occasion will not excuse an aspersive attack on the motives and character of the officer; to excuse such attack truth must be shown. *Hamilton v. Eno*, 81 N. Y. 116. See, *Com. v. Wardwell*, 136 Mass. 164; *Briggs v. Garrett*, 111 Pa. St. 404; *Rowand v. DeCamp*, 96 Pa. St. 493. The trustee of a

*The public press is also allowed to give full reports of [*257] judicial trials and hearings, provided they are not *ex parte* merely, and are not indecent or blasphemous.⁶ But such reports must be confined to the actual proceedings, and must contain no defamatory observations, headings or comments.⁷ The reason why the publication of *ex parte* proceedings is *not privileged is, that it has a tendency “to prejudice [*258] those whom the law still presumes to be innocent, and to

mining corporation is not such a public officer as to render the incumbent amenable to criticism through newspapers, as in case of persons filling public offices of trust and confidence, in the proper administration of which the community has an interest. *Wilson v. Fitch*, 41 Cal. 363.

5—*Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865; *Clifton v. Lange*, 108 Ia. 472, 79 N. W. 276; *Fitzpatrick v. Daily State Pub. Co.*, 48 La. Ann. 1116, 20 So. 173; *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853. “To be privileged, the words must have been published without actual malice, in an honest belief of their truth, and with that belief based upon reasonable or probable cause after a reasonably careful inquiry.” *McNally v. Burleigh*, 91 Me. 22, 39 Atl. 285; *Vance v. Louisville Courier-Journal Co.*, 95 Ky. 41, 23 N. W. 591.

6—*Hoare v. Silverlock*, 9 C. B. 20; *Lewis v. Levy*, El. B. & El. 537; *Ryalls v. Leader*, L. R. 1 Exch. 296; *Terry v. Fellows*, 21 La. Ann. 375; *Gazette Co. v. Timberlake*, 10 Ohio St. 548; *Torrey v. Field*, 10 Vt. 353; *Saunders v. Baxter*, 6 Heisk. 369; *Storey v. Wallace*, 60 Ill. 51; *McBee v. Fulton*, 47 Md. 403, 28 Am. Rep. 465;

Connor v. Standard Pub. Co., 183 Mass. 474, 67 N. E. 596; *Moore v. Dispatch Printing Co.*, 87 Minn. 450, 92 N. W. 396; *Boogher v. Knapp*, 97 Mo. 122, 11 S. W. 45; *Bissell v. Press Pub. Co.*, 62 Hun, 551, 17 N. Y. S. 393; *Hart v. Sun Printing & Pub. Co.*, 79 Hun, 358, 29 N. Y. S. 434; *Lawyers Co-Op. Pub. Co. v. West Pub. Co.*, 32 App. Div. 585, 53 N. Y. S. 5. The privilege extends to proceedings in the nature of trials in voluntary associations; as, for example, a medical society. *Barrows v. Bell*, 7 Gray, 301, 66 Am. Dec. 479. Also to foreign judicial proceedings. *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. S. 401.

7—*Styles v. Nokes*, 7 East. 493; *Delegal v. Highley*, 3 Bing. N. C. 950; *Thomas v. Crosswell*, 7 Johns. 264, 5 Am. Dec. 269; *Pittock v. O’Niell*, 63 Pa. St. 253, 3 Am. Rep. 544; *Usher v. Severance*, 20 Me. 9, 37 Am. Dec. 73; *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575; *Story v. Wallace*, 60 Ill. 51; *Bathrick v. Detroit, &c., Co.*, 50 Mich. 629; *Moore v. Dispatch Printing Co.*, 87 Minn. 450, 92 N. W. 396; *Hart v. Sun Printing & Pub. Co.*, 79 Hun, 358, 29 N. Y. S. 434; *Lawyer Co-Op. Pub. Co. v. West Pub. Co.*, 32 App. Div. 585, 53 N. Y. S. 5; *Stuart v. Press Pub.*

poison the source of justice.”⁸ In Rhode Island it is held that a full and fair report of a judicial proceeding, though preliminary and *ex parte*, is privileged.⁹ And the English Court of Appeals, in a recent case, has held that the publication, without malice, of a fair and accurate report of the proceedings before a magistrate, upon an *ex parte* application for a summons for perjury, is privileged, and that public policy is opposed to the secrecy of judicial proceedings.¹⁰ The Supreme Court of Kentucky has gone further and held that a complaint made to a magistrate for a criminal warrant, though the prosecution was dropped and the complaint was not signed or sworn to, was within the rule, and that a publication of a fair and impartial report of the same was privileged.¹¹ If the report of a judicial proceeding is not full and fair, the privilege is lost.¹²

Co., 83 App. Div. 467, 82 N. Y. S. 401. There is no privilege attached to printing slanderous remarks of counsel during a trial. *Cone v. Godshalk*, 13 Phila. 575. See, also, *McDermott v. Evg. Journal Co.*, 43 N. J. L. 488, on what is not a report of a judicial proceeding. The report of judicial proceedings to be privileged must not only be fair, but made in good faith and without malice. *Stevens v. Sampson*, L. R. 5 Ex. D. 53.

8—Per ELLENBOROUGH, Ch. J., in *Rex v. Fisher*, 2 Camp. 563. See *Duncan v. Thwaites*, 3 B. & C. 556; *Flint v. Pike*, 4 B. & C. 473; *Charlton v. Watton*, 6 C. & P. 385; *Behrens v. Allen*, 3 Fost. & Fin. 135; *Huff v. Bennett*, 4 Sandf. 120; *Stanley v. Webb*, 4 Sandf. 21; *Matthews v. Beach*, 5 Sandf. 256; *Usher v. Severance*, 20 Me. 9, 37 Am. Dec. 33. But if the result of an *ex parte* proceeding is that the accused party is discharged, the proceeding, it

seems, may be published. *Curry v. Walter*, 1 B. & P. 525; *Lewis v. Levy*, El. Bl. & El. 537; *Usill v. Hales*, L. R. 3 C. P. D. 319.

9—*Metcalf v. Times Pub. Co.*, 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900, an *ex parte* application for injunction. In *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. S. 401, it is held that the privilege does not attach “until an application is made to a magistrate, judge or court for some judicial action,” and by implication that it does then attach.

10—*Kimber v. Press Ass.*, (1893) 1 Q. B. 65.

11—*Beiser v. Scrippes McRea Pub. Co.*, 113 Ky. 383, 68 S. W. 457. The court says: “Although the magistrate may not issue the warrant except upon information given him on oath, it would seem that, under the somewhat informal procedure which obtains with us upon such application, the application to make the affidavit should be considered as within the

The publication of the pleadings and papers filed in a suit is not privileged until some judicial action is taken thereon.¹³ "If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public have no right to any information of private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it."¹⁴

The privilege of the press is not confined to those who publish newspapers and other serials, but extends to all who make use of it to place information before the public.¹⁵

rule, and as constituting a judicial procedure, if made to the justice in his judicial capacity, in good faith, for the purpose of such a prosecution. Such an application is not a mere private or confidential communication. It is the first step in a judicial proceeding in a justice's court. It is not and should not be secret. * * * We are, therefore of the opinion that an application to make an affidavit for the purpose of instituting a prosecution is one step in a judicial proceeding, though such application be denied, and that a fair and impartial publication of the charge thus made is a privileged publication." pp. 391-2. But reports or complaints made to a police officer of crimes committed are not judicial proceedings and are not privileged. *Jastrzembski v. Marxhausen*, 120 Mich. 677, 79 N. W. 935.

12—*Metcalf v. Times Pub. Co.*,

20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900.

13—*Barker v. St. Louis, &c., Co.*, 3 Mo. App. 377; *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318; *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. S. 401; *Wills v. Jones*, 13 App. D. C. 482; *Metcalf v. Times Pub. Co.*, 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900.

14—*Park v. Detroit Free Press Co.*, 72 Mich. 560, 568, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599. In *Searles v. Scarlet*, (1892) 2 Q. B. 56, it is held that the publication of court records to which the public have access, is privileged.

15—See *Barrows v. Bell*, 7 Gray, 301, 66 Am. Dec. 479. One who writes an article to a newspaper, which is changed so as to be libelous, is not liable, if his own article was not of that character. *Klos v. Zaharik*, 113 Ia. 161, 84 N. W. 1046, 53 L. R. A. 235.

No privilege seems to be accorded to the publication of news;¹⁶ but publishers will not be liable in exemplary damages for the appearance in their journals of false items of intelligence without their personal knowledge, where they have been guilty of no negligence in the selection of the agents through whom the publication has been made, and have not been accustomed habitually to make their journals the vehicle of detraction and malice;¹⁷

and the press may lawfully warn the public against the [*259] conduct and motives of those who are believed to be disloyal, or to threaten the peace of the State; and the fair and honest discussion of matters of public interest is always privileged.¹⁸

16—*Barnes v. Campbell*, 59 N. H. 128, 47 Am. Rep. 183; *Pratt v. Pioneer Press Co.*, 30 Minn. 41; *Mallory v. Same*, 34 Minn. 521. See *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715.

17—*Daily Post Co. v. McArthur*, 16 Mich. 447; *Perrett v. New Orleans Times*, 25 La. Ann. 170; *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575; *Gibson v. Cincinnati Enquirer*, 5 Cent. L. Jour. 380. In *Crane v. Bennett*, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722, it is held that the proprietor of a newspaper is responsible for all that appears in its columns, though the entire management is turned over to others and he lives abroad and has no knowledge of what is to be published, and that, as falsity implies malice, whoever is liable for the act of publication is liable also for punitive damages.

18—*Kinyon v. Palmer*, 18 Iowa, 377. The result of a trial may be given as an item of news. *Whit-*

ney v. Janesville Gazette, 5 Diss. 330. In *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446, the court says: "In regard to matters of public interest, all that is necessary to render the words spoken or published privileged is, that they should be communicated in good faith, without malice, to those who have an interest in the subject matter to which they refer, and in an honest belief that the communication is true, such belief being founded on reasonable and probable grounds. In such cases, the occasion rebuts the inference of malice, which the law would otherwise draw from unauthorized communications, and affords a qualified defense depending upon the absence of malice. If fairly warranted by any such occasion or exigency as we have named, and honestly made, upon reasonable and probable grounds, such communications are protected for the common protection and welfare of society." p. 543.

Liberty of the press is not license¹⁹ and newspapers have no privilege to publish falsehoods,²⁰ or to defame under the guise of giving the news.²¹ It is held that the press occupies no better position than private persons publishing the same matter, that it is subject to the law and, if it defames, it must answer for it.²² "As a publisher of news and items of public importance the press should have the freest scope; but as a scandal-monger it should be held to the most rigid limitation."²³

The publication of a fair and true report of legislative proceedings is privileged.²⁴ But a newspaper is not justified in publishing, as an item of news, a libelous resolution passed by a city council, which is without the scope of their power and duty.²⁵

19—*Fitzpatrick v. Daily States Pub. Co.*, 48 La. Ann. 1116, 20 So. 173.

20—*Haynes v. Clinton Printing Co.*, 169 Mass. 512, 48 N. E. 275; *Belknap v. Ball*, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72.

21—*Democrat Pub. Co. v. Jones*, 83 Tex. 302, 18 S. W. 652.

22—*Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599; *Upton v. Hume*, 24 Ore. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493; *Morse v. Times-Republican Print. Co.*, 124 Ia. 707, 100 N. W. 867.

23—*Metcalf v. Times Pub. Co.*, 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900; *Gilman v. McClatchy*, 111 Cal. 606, 44 Pac. 241; *Moore v. Leader Pub. Co.*, 8 Pa. Supr. Ct. 152.

24—*Garby v. Bennett*, 166 N. Y. 392, 59 N. E. 117. A member of a legislative body, it is said in England, is not privileged in publishing the words of a speech made by him to the House. *Rex v.*

Lord Abingdon, 1 Esp. 226; *Rex v. Creevy*, 1 M. & S. 273. But in this country, where the publication of speeches and debates is made by authority of law, it would seem that the privilege to publish must be as broad as the privilege to speak. In Louisiana it is held that a newspaper is privileged in publishing the testimony taken before a Congressional committee. *Terry v. Fellows*, 21 La. Ann. 375. There is no privilege in publishing a slander uttered by a murderer at the gallows. *Sanford v. Bennett*, 24 N. Y. 20. Nor merely because the publication relates to a matter of public interest. *Wilson v. Fitch*, 41 Cal. 363.

25—*Trebby v. Transcript Pub. Co.*, 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330. The court says: "It is true that the publication complained of was, as a matter of news, entirely true; that is, the city council did pass the resolution just as stated by the defendant. But the publication in a newspaper of false and defamatory matter is not privileged be-

As to what are matters of public interest, the discussion of which in the newspapers, is privileged, no comprehensive definition can be given.²⁶ The sanitary condition of houses owned by the plaintiffs and housing two thousand persons is such a matter.²⁷ A clergyman is held to be a public man in such sense that public comment in a proper manner upon his sayings and doings in his public capacity is justified.²⁸ And where a person holds himself out as a teacher and advertises in order to attract youth to his school, he is held to become a quasi public character, so that the printing of information about the man and his system is privileged.²⁹ But if the limits of fair comment are overstepped in any such case a liability attaches.³⁰

Books and writings, when published to the world by their authors, become matters of public interest, and any person is privileged to indulge in the fair and reasonable criticism thereof through the public prints or otherwise.³¹ "When an author

cause made in good faith as an item of news. The right to publish through the newspaper press such matters of interest as may thus properly be laid before the public does not go to the extent of allowing the publication concerning a person of false and defamatory matter, there being no other reason or justification for doing so than merely the purpose of publishing news." p. 89.

26—As to what is matter of public interest, see *Purcell v. Sowler*, L. R. 2 C. P. Div. 215, qualifying the decision in the court below. Also, *Davis v. Duncan*, L. R. 9 C. P. 396; *S. C. 10 Moak*, 228; *Henwood v. Harrison*, L. R. 7 C. P. 606; *S. C. 3 Moak*, 398. Matters held not to come within rule as to public interest. *Atkinson v. Detroit &c. Co.*, 46 Mich. 341; *Tryon v. Evg. News Assn.*, 39 Mich. 636. An interview on a matter of public interest "must be made upon

a proper occasion, from a proper motive and must be based on reasonable or probable cause." *Press Co. v. Stewart*, 119 Pa. St. 584, 14 Atl. 51.

27—*South Hetton Coal Co. v. N. E. News Assn.*, (1894) 1 Q. B. 133.

28—*Klos v. Zaharik*, 113 Ia. 161, 84 N. W. 1046, 53 L. R. A. 235. Not so the trustee of a private corporation. *Wilson v. Fitch*, 41 Cal. 363.

29—*Press Co. v. Stewart*, 119 Pa. St. 584, 14 Atl. 51.

30—*Joynt v. Cycle Trade Pub. Co.*, (1904) 2 Q. B. 292.

31—*Dowling v. Livingstone*, 108 Mich. 321, 66 N. W. 325, 62 Am. St. Rep. 702, 32 L. R. A. 104; *Triggs v. Sun Printing & Pub. Co.*, 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612; *Triggs v. Sun Printing & Pub. Co.*, 91 App. Div. 259, 86 N. Y. S. 486; *McDonald v. Sun Print-*

places his book before the public he invites criticism; and, however hostile that criticism may be, and however much damage it may cause him by preventing its sale, the critic is not liable in an action for libel, provided he makes no misstatements of any material facts contained in the writing, and does not attack the character of the author. The book and the criticism are both before the public."³² The same rules apply to a picture or work of art.³³ The ideas, theories, and statements of an author may be treated with ridicule and sarcasm, so long as this treatment is confined to the production itself,³⁴ but the occasion affords no privilege for statements which have no basis in the book or composition, or for false assertions regarding the author, or for an attack on his private character, or for making his private life and character the subject of public ridicule and contempt.³⁵

Some Further Considerations in Respect to Privilege. The general doctrine of privilege, as applied to actions for libel and slander, is founded upon the reasonable view that in the intercourse between members of society, and in proceedings in legislative bodies and in courts of justice, occasions arise when it becomes necessary or proper that the character and acts of individuals should be considered and made the subject of state-

ing & Pub. Co., 45 Misc. 441, 92 N. Y. S. 37; *Browning v. Van Rensselaer*, 8 Pa. Dist. Ct. 690; *MacDonald v. Sun Print. & Pub. Co.*, 45 Misc. 441, 92 N. Y. S. 37.

32—*Dowling v. Livingstone*, 108 Mich. 321, 327, 66 N. W. 325, 62 Am. St. Rep. 702, 32 L. R. A. 104.

33—*Battersby v. Collier*, 34 App. Div. 347, 54 N. Y. S. 363.

34—*Dowling v. Livingstone*, 108 Mich. 321, 66 N. W. 325, 62 Am. St. Rep. 702, 32 L. R. A. 104; *Triggs v. Sun Printing & Pub. Co.*, 91 App. Div. 259, 86 N. Y. S. 486.

35—*McDonald v. Sun Printing & Pub. Co.*, 45 Misc. 441, 92 N. Y. S. 37; *Triggs v. Sun Printing & Pub. Co.*, 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L.

R. A. 612. In the latter case the court says: "The distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow a public man into his private life or pry into his domestic concerns. It never attacks the individual but only his work. A true critic never indulges in personalities, but confines himself to the merits of the subject matter, and never takes advantage of the occasion to attain any other object beyond the fair discussion of matters of public interest and the judicious guidance of the public taste." p. 156.

ment or comment, and that, in the interests of society, a party making disparaging statements in respect to another on such a lawful occasion, should not be subject to civil responsibility in an action of this character, although such statements are untrue.³⁶ The doctrine of privilege rests upon public policy.³⁷ A privileged communication is founded upon a privileged occasion, and, strictly speaking, it is the occasion that is privileged, rather than the communication.³⁸ The occasion affords the privilege of making the communication, and the same communication is privileged or not according to the occasion on which it is made. Privileged occasions are divided into two classes with reference to the extent of the privilege afforded, those absolutely privileged and those conditionally privileged.³⁹ The distinction between the two classes is well stated in the case last referred to, as follows: "The general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly and with express malice, impose no liability for damages recoverable in an action of slander; while such words spoken upon an occasion only conditionally privileged, impose such liability, if spoken with what is called express malice." Occasions of absolute privilege are confined to the legislative proceedings of sovereign states, judicial proceedings in established courts of justice, acts of state and acts done in the exercise of military and naval authority.⁴⁰ In cases of absolute privilege the only question is whether the words in question are within the scope of the privilege which the occasion affords.

Some judicial definitions of qualified or conditional privilege are here added: "Qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a

36—Moore v. Manufacturers' Co., 67 Conn. 504, 516, 34 Atl. 865. Nat. Bank, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753.

37—Wilson v. Sullivan, 81 Ga. 106.

238, 7 S. E. 234; Abbott v. National Bank of Commerce, 20 Wash. 552, 56 Pac. 376.

39—Blakeslee v. Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A.

40—Ibid. In the same case it is said that the tendency is not to enlarge the limits of absolute

38—Atwater v. Morning News privilege.

duty, to a person having a corresponding interest or duty; and embraces cases where the duty is not a legal one, but is of a moral or social character, of imperfect obligation.”⁴¹ “To entitle a party to claim that an alleged libelous publication is privileged, it must appear that it was made in the discharge of a public or private duty, or for the protection of his private interests, and that it was relevant and proper in that connection, and based upon a reasonable and probable necessity in the premises.”⁴² “A communication made in good faith in reference to a matter in which the person communicating has an interest or in which the public has an interest is privileged, if made to another for the purpose of protecting that interest, and a communication made in the discharge of a duty and looking to the prevention of wrong towards another or the public is so privileged when made in good faith.”⁴³ “When a person is so situated that it becomes right in the interests of society that he should tell a third person certain facts, then if he, *bona fide* and without malice, does tell them, it is a privileged occasion.”⁴⁴ A privileged communication has been repeatedly defined in Pennsylvania as one made upon a proper occasion, from a proper motive, in a proper manner, and based upon reasonable or probable cause.⁴⁵ In view of all the authorities which have been considered on the subject, a privileged communication may be defined as one made on a privileged occasion and within the scope of the privilege which the occasion creates or justifies. If it goes beyond or outside the privilege and is defamatory in respect to such excess, then the

41—Pollasky v. Minchener, 81 Mich. 280, 283, 46 N. W. 5, 21 Am. St. Rep. 516, 9 L. R. A. 102.

42—Traynor v. Sielaff, 62 Minn. 420, 424, 64 N. W. 915.

43—Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 575, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280.

44—BLACKBURN, J., in Davis v. Sneed, L. R. 5 Q. B. 611. Approved in Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 25 N. E.

1048, 11 L. R. A. 753. Also in Coogler v. Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170.

45—Conroy v. Pittsburg Times, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep. 188, 11 L. R. A. 725; Wallace v. Jameson, 179 Pa. St. 98, 36 Atl. 142; Coates v. Wallace, 4 Pa. Supr. Ct. 253. So also Hebner v. Great Northern Ry Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387. For further definition or statements of the doctrine or

excess is not protected by the privilege and an action will lie.⁴⁶ A privileged occasion is one where a person has a right or duty, recognized by law, to make a communication which, but for the occasion, would be actionable. Such right or duty exists when the communication relates to a matter of public interest, or to a matter of private interest to one or both the parties to the communication. The interest required to exist must be one relating to the welfare of the individual and may be of a pecuniary nature or otherwise. Both parties to the communication may have such an interest, and in such case the privilege is clear.⁴⁷ If only one party has the interest, the communication may be made *by* such party, when necessary for the protection of that interest, as in seeking professional advice and it may be in other ways. But ordinarily the communication is made *to* the party having an interest, and the question arises under what circumstances a person is justified in making such communication. If the information is requested by the person having the interest, the right or duty to give it is clear.^{47a} And the better rule would seem to be that one may volunteer information to any person having an interest therein, as above explained, in any case where he would be justified in giving it on request.⁴⁸ But a person who

principles of conditional privilege see *Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865; *Nichols v. Eaton*, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483; *Caldwell v. Story*, 107 Ky. 10, 52 S. W. 850, 45 L. R. A. 735; *McBride v. Ledoux*, 111 La. 398, 35 So. 615, 100 Am. St. Rep. 491.

46—*Jones v. Forehand*, 89 Ga. 520, 16 S. E. 262, 32 Am. St. Rep. 81; *Sharp v. Bowler*, 103 Ky. 282, 45 S. W. 90; *Sullivan v. Strathan-Hutton-Evans Com. Co.*, 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859; *Tillinghast v. McLeod*, 17 R. I. 208, 21 Atl. 345; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803.

47—*Nichols v. Eaton*, 110 Ia.

509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483.

47a—*Howland v. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. 656.

48—*Mott v. Dawson*, 46 Ia. 533; *Fresh v. Cutter*, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; *Rude v. Nass*, 79 Wis. 321, 48 N. W. 555, 24 Am. St. Rep. 717; *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280. In the last case the court says: "It seems to us that any person who upon reasonable grounds believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the

thus volunteers information must make sure at his peril that the person to whom he communicates it has the interest which will justify the communication.⁴⁹

A communication privileged because made to one having a private and personal interest must be made in such a way as not to be unnecessarily published to other parties.⁵⁰ But in the case of a matter of public interest the communication may be made through the ordinary channels of reaching the public or that part of the public which is interested in the communication. If the matter is one of general public interest no difficulty can arise, for all are presumably interested and the communication can reach none who are not. But in matters of local public interest any communication made in the ordinary way, through the public prints may reach those who have no interest, either because they are not residents or taxpayers of the locality, or because they do not belong to the class concerned. The correct rule would seem to be that the privilege extends not only to the right to make the

right in *good faith* to communicate such belief to that other, and he may make the communication with or without request, and whether he has or has not personally any interest in the subject matter of the communication." p. 576. But see *Samples v. Carnahan*, 21 Ind. App. 55, 51 N. E. 425, 69 Am. St. Rep. 340; *Davis v. Wells*, 25 Tex. Civ. App. 155, 60 S. W. 566; *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129; ante p. 437, note 88. The rule is frequently stated substantially as in the following extract: "The general rule may be stated to be that a communication made in good faith upon any subject in which the person has an interest, or with reference to which he has a duty, public or private, either legal, moral or social, if made to a person having a corresponding

interest or duty, is privileged." *Caldwell v. Story*, 107 Ky. 10, 13, 52 S. W. 850, 45 L. R. A. 735. See *Sullivan v. Strathan-Hutton-Evans Com. Co.*, 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859. But duty here may consist in that moral or social obligation which rests on one to communicate information which he knows to be important to the interests of another. "An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it." *Pullman v. Hill*, (1891) 1 Q. B. 524.

49—*Hobditch v. MacIlwaine*, (1894) 2 Q. B. 54.

50—See *Toogood v. Spyring*, 1 Crompton M. & R. 181; *Padmore v. Lawrence*, 11 A. & E. 380.

communication but to the right to make it in the ordinary, usual and only practicable way. Thus where it was proper for the officers of a particular church to communicate certain matters to the members of the denomination at large, to which the church belonged, it was held that they might make use of the denominational papers for that purpose, and that the communication was privileged, though it thus reached those who were not members of the denomination.⁵¹ But in Wisconsin it has been held that an article in a newspaper relating to a matter of municipal interest, which reflected on the official conduct of a state senator, was not privileged if the newspaper circulated outside the city and senatorial district.⁵² And this case has been followed in Iowa.^{52a} Such a holding would seem to preclude the free discussion of matters of local interest either in the press or in public meetings.

If a communication is one of conditional privilege then no action lies unless it is false and malicious and the burden to establish this is on the plaintiff.⁵³ If the communication is de-

51—*Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236.

52—*Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853.

52a—*State v. Haskins*, 109 Ia. 656, 80 N. W. 1063, 77 Am. St. Rep. 560.

53—*Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; *Wharton v. Wright*, 30 Ill. App. 343; *Nichols v. Eaton*, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483; *Sharp v. Bowlar*, 103 Ky. 282, 45 S. W. 90; *Gardemal v. McWilliams*, 43 La. Ann. 454, 9 So. 106, 26 Am. St. Rep. 195; *Fresh v. Cutler*, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; *Garn v. Lockard*, 108 Mich. 196, 65 N. W. 764; *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 80 N. W. 1128,

79 Am. St. Rep. 387; *Wagner v. Scott*, 164 Mo. 289, 73 S. W. 1107; *Fahr v. Hayes*, 50 N. J. L. 275, 13 Atl. 261; *Rothholz v. Dunkle*, 53 N. J. L. 438, 22 Atl. 193, 13 L. R. A. 655; *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129; *McGaw v. Hamilton*, 184 Pa. St. 108, 39 Atl. 4; *McIntyre v. Weinert*, 195 Pa. St. 52, 45 Atl. 666; *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280; *Posnett v. Marble*, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162; *Nevill v. Fine Arts, etc., Ins. Co.*, (1895) 2 Q. B. 156. If the motives of the defendant are in part malicious he is liable, though he acted in part from honorable and justifiable motives. *Cranfill v. Hayden*, 97 Tex. 544, 80 S. W. 609.

famatory it is presumed to be false as in other cases but malice is not presumed from falsity alone.⁵⁴ The evidence to show malice may be intrinsic, consisting of the style, tone and manner of the communication itself, or extrinsic, consisting of the expression of a malicious intent, or that the defendant knew or had reason to believe that the statements were false, or other circumstances.⁵⁵ But whether the evidence is intrinsic or extrinsic the question is one for the jury.⁵⁶

Whether an occasion is privileged is a question of law for the court,⁵⁷ but if the facts upon which the privilege depends are in dispute, it is a mixed question of law and fact to be submitted to the jury under proper instructions, that is, the court should instruct the jury what facts, if proved, would constitute a privileged occasion and for the jury to find whether the facts are established.⁵⁸

54—*Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; *Nichols v. Eaton*, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483; *Fresh v. Cutler*, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; *Howard v. Dickie*, 120 Mich. 238, 79 N. W. 191; *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387; *Rothholz v. Dunkle*, 53 N. J. L. 438, 22 Atl. 193, 13 L. R. A. 655; *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; *Kent v. Bongartz*, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870; *Cranfill v. Hayden*, 97 Tex. 544, 80 S. W. 609. See *Bryant v. Pittsburg Times*, 192 Pa. St. 585, 44 Atl. 251.

55—*Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; *Howard v. Dickie*, 120 Mich. 238, 79 N. W. 191; *Wagner v. Scott*, 164 Mo. 289, 63 S. W. 1107; *Byrd v. Hudson*, 113 N. C. 203, 18 S. E. 209; *Conroy v. Pittsburg Times*, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep. 188, 11 L. R. A. 725; *Wallace v. Jameson*, 179 Pa. St. 98, 36 Atl. 142; *Nichols v. Eaton*, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483.

56—Ibid: *Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865.

57—*Nichols v. Eaton*, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483; *Garn v. Lockard*, 108 Mich. 196, 65 N. W. 764; *Sullivan v. Strathan-Hutton-Evans Com. Co.*, 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859; *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129; *Norfolk & W. Steamboat Co. v. Davis*, 12 App. D. C. 306; *Mauk v. Brundage*, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803.

58—*Parker v. Republican Co.*, 181 Mass. 392, 63 N. E. 931; *Warner v. Press Pub. Co.*, 132 N. Y.

Privilege should be specially pleaded,⁵⁹ but in Tennessee it is held that the defense may be made either under the general issue or by special plea.⁶⁰ Some additional cases on what does, or does not, constitute a privileged occasion are referred to in the margin.⁶¹

Repeating Slanders and Libels. There is no privilege in repeating defamatory publications. Therefore it is no defense that the defendant only repeated what had been told him by another whose name he gives, or copied into his newspaper a charge originating elsewhere, or published it as an advertisement or communication.⁶² Sometimes the fact may mitigate damages, but it cannot excuse the publication.⁶³ Neither is it a defense

181, 30 N. E. 393; *Post Publishing Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921.

59—*Stevenson v. Ward*, 48 App. Div. 291, 62 N. Y. S. 717; *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. S. 401; *Gudger v. Penland*, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73.

60—*Cooley v. Galyon*, 109 Tenn. 1, 70 S. W. 607, 97 Am. St. Rep. 823, 60 L. R. A. 139.

61—*Cristman v. Cristman*, 36 Ill. App. 567; *Ritchie v. Arnold*, 79 Ill. App. 406; *Billet v. Times-Democrat Pub. Co.*, 107 La. 751, 32 So. 17, 58 L. R. A. 62; *Neil v. Fords*, 72 Hun, 12, 25 N. Y. S. 406; *Lally v. Emery*, 79 Hun, 560, 29 N. Y. S. 888; *McCarty v. Lambley*, 20 App. Div. 264, 46 N. Y. S. 792; *Ginsberg v. Union Surety, etc., Co.*, 68 App. Div. 141, 74 N. Y. S. 561; *Harrison v. Garrett*, 132 N. C. 172, 43 S. E. 594; *Hudnell v. Eureka Lumber Co.*, 133 N. C. 169, 45 S. E. 532; *Ingram v. Reed*, 5 Pa. Supr. Ct. 550; *Commonwealth v. Swallow*, 8 Pa. Supr. Ct. 539; *McKnight v. Hasbrouck*, 17 R. I. 70, 20 Atl. 95; *Strode v. Clement*, 90

Va. 553, 19 S. E. 177; *Brown v. Norfolk, etc., Ry. Co.*, 100 Va. 619, 42 S. E. 664, 60 L. R. A. 472; *Kimble v. Kimble*, 14 Wash. 369, 44 Pac. 866; *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873; *Scullin v. Harper*, 78 Fed. 460, 24 C. C. A. 169; *Stuart v. Bell*, (1891) 2 Q. B. 341; *Nevill v. Fine Arts, &c., Ins. Co.*, (1897) A. C. 68.

62—*Spolek Denni Hlarated v. Hoffman*, 204 Ill. 532, 68 N. E. 400; *Blocker v. Schoff*, 83 Ia. 265, 48 N. W. 1079; *Nicholson v. Merritt*, 109 Ky. 369, 59 S. W. 25; *Harris v. Minvielle*, 48 La. Ann. 908, 19 So. 925; *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Barr v. Beikner*, 44 Neb. 197, 62 N. W. 494; *Raines v. N. Y. Press Co.*, 92 Hun, 515, 37 N. Y. S. 45; *Wallace v. Rodgers*, 156 Pa. St. 395, 27 Atl. 163; *Stepp v. Croft*, 18 Pa. Supr. Ct. 101.

63—*Rex v. Newman*, 1 El. & Bl. 268; *Parker v. McQueen*, 8 B. Mon. 16; *Hampton v. Wilson*, 4 Dev. 468; *Keney v. McLaughlin*, 5 Gray, 3; *Evans v. Smith*, 5 T. B. Mon. 363; *Hotchkiss v. Oliphant*, 2 Hill, 510; *Sheahan v. Collins*, 20

that a report was current and generally believed that the plaintiff was guilty of what was imputed to him,⁶⁴ or that the publication professed to give a rumor merely.⁶⁵ One is not liable for the unauthorized repetition of his words by others.⁶⁶

Ill. 325; *McDonald v. Woodruff*, 2 Dill. 244; *Sans v. Joerris*, 14 Wis. 663; *Funk v. Beverly*, 112 Ind. 190, 13 N. E. 573; *Spolek Denni Hlarated v. Hoffman*, 204 Ill. 532, 68 N. E. 400; *Hoboken Printing & Pub. Co. v. Kahn*, 58 N. J. L. 359, 33 Atl. 1060, 55 Am. St. Rep. 609; *Wallace v. Rodgers*, 156 Pa. St. 395, 27 Atl. 163. No excuse that at the time he expresses a doubt of its truth, nor that he repeats it to get advice whether person affected should be informed of it, when there is no confidential relation existing between them. *Branstetter v. Dorough*, 81 Ind. 527. "No character or reputation would be safe, if a mere statement of a person's disbelief of a rumor which the speaker was engaged in circulating could be made to defeat the right of recovery for the slander." *Nicholson v. Merritt*, 109 Ky. 369, 59 S. W. 25. But see, *Cook v. Howe*, 77 Ind. 442. That he repeats the story will not shield one unless at the time of the repetition he gives the plaintiff an action against the original author. *Johnson v. St. Louis & Co.*, 65 Mo. 539, 27 Am. Rep. 293. It is not a repetition for one to say to another: "A. said all she wanted to about P." *Pauley v. Drain*, 6 S. W. Rep. 329 (Ky.) In *Preston v. Frey*, 91 Cal. 107, 27 Pac. 533, the fact that the statements were matter of common report was held not admissible in mitigation of damages. And where a libel on its face purported to be published

of the defendant's own knowledge, it was held it could not be shown in mitigation of damages that it originated with another. *Wallace v. Homestead Co.*, 117 Ia. 348, 90 N. W. 835. And see *Palmer v. N. Y. News Pub. Co.*, 31 App. Div. 210, 52 N. Y. S. 539; *Gray v. Brooklyn Union Pub. Co.*, 35 App. Div. 286, 55 N. Y. S. 35.

64—*Moberly v. Preston*, 8 Mo. 462; *Knight v. Foster*, 39 N. H. 576; *Cade v. Redditt*, 15 La. Ann. 492; *Clarkson v. M'Carty*, 5 Blackf. 574; *Johnston v. Lance*, 7 Ired. 448; *Perrett v. Times Newspaper*, 25 La. Ann. 170.

65—*Wheeler v. Shields*, 3 Ill. 348; *Mason v. Mason*, 4 N. H. 110. See *Thompson v. Bowers*, 1 Doug. (Mich.) 321; *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156; *State v. Butnam*, 15 La. Ann. 166. Giving with the publication the name of the author is no protection. *Dole v. Lyon*, 10 Johns. 447, 6 Am. Dec. 346; *Cates v. Kellogg*, 9 Ind. 306; *Haines v. Welling*, 7 Ohio, 253; *Fowler v. Chichester*, 26 Ohio St. 9; *Cummerford v. McAlvoy*, 15 Ill. 311; *Inman v. Foster*, 8 Wend. 602. Nor is it a defense that a rumor existed previous to the publication to the same effect. *Haskins v. Lumsden*, 10 Wis. 359; *Knight v. Foster*, 39 N. H. 576; *Carpenter v. Bailey*, 53 N. H. 590; *Skinner v. Powers*, 1 Wend. 451; *Beardsley v. Bridgman*, 17 Iowa, 290. But the fact may mitigate damages. *Farr v. Rasco*, 9 Mich. 353.

66—*Elmer v. Fessenden*, 151

[*260] ***Slander of Property.** A person may be as seriously injured by misrepresentation of his property as by the slander of himself in respect to his business; and, indeed, the two often go together. But there may be misrepresentation in respect to particular articles of property not connected with one's business, and where the injury will concern the property alone. Such misrepresentation is actionable, provided it is malicious and damaging; but malice will not be presumed, and damage must be alleged and proved.⁶⁷ An action will not lie for libel of a business shown to be essentially fraudulent or illegal.⁶⁸

Slander of Title. An action lies for maliciously slandering the title to the plaintiff's property; but here, as in slander of property, it is necessary to aver and prove both malice and damage.⁶⁹ The action rests upon the general principle that when one injures another by any wrongful and malicious conduct, he is liable in an action on the special case.⁷⁰ It is of course never

Mass. 359, 24 N. E. 208, 5 L. R. A. 724; *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Raines v. N. Y. Press Co.*, 92 Hun, 515, 37 N. Y. S. 45.

67—*Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322; *Maglio v. N. Y. Herald Co.*, 93 App. Div. 546, 87 N. Y. S. 927; *Maglio v. N. Y. Herald Co.*, 83 App. Div. 44, 82 N. Y. S. 509; *Bosi v. N. Y. Herald Co.*, 33 Misc. 622, 68 N. Y. S. 898; *Holmes v. Clisby*, 118 Ga. 820, 45 S. E. 684; *Young v. Geiske*, 209 Pa. St. 515, 58 Atl. 887; *Browning v. Van Rensselaer*, 8 Pa. Dist. Ct. 690; *White v. Melin*, (1895) A. C. 154.

68—*Wettmer v. Bishop*, 171 Mo. 110, 71 S. W. 167. If the falsity of the representations is proved, and injury resulting therefrom, it is said malice is to be presumed. *Swan v. Tappan*, 5 Cush. 104.

69—See generally *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; *May v. Anderson*, 14 Ind. App. 251, 42 N. E. 946; *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. 290; *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492, 19 S. W. 804, 33 Am. St. Rep. 476, 16 L. R. A. 243; *Butts v. Long*, 94 Mo. App. 687, 68 S. W. 754; *Hastings v. Giles Lithographic Co.*, 51 Hun, 364, 4 N. Y. S. 319; *Cornwell v. Parker*, 52 Hun, 596, 5 N. Y. S. 905; *Harriss v. Sneed*, 101 N. C. 273, 7 S. E. 801; *Cardon v. McConnell*, 120 N. C. 461, 27 S. E. 109; *Moore v. Rowbotham*, 19 Phila. 272; *Hopkins v. Drowne*, 21 R. I. 20, 41 Atl. 567.

70—*Malachy v. Soper*, 3 Bing. (N. C.) 371. In this case and in *Bigelow's* notes thereto, *Lead. Cas.* 54-59, the authorities are fully collected.

wrongful for one to assert a title in himself to property, or to seek to establish it by judicial proceedings, provided this is done in good faith,⁷¹ and good faith must be presumed while the proceedings are pending; but we have seen that after they are disposed of, an action may lie, if malice and want of probable cause be made out.⁷²

Damages. The damages recoverable in actions of slander and libel are of two classes, (1) actual or compensatory damages, and (2) exemplary or punitive damages. Actual or compensatory damages may be general or special. General damages embrace loss of reputation, shame, mortification, injury to the feelings and the like and need not be alleged in detail and require no proof.⁷³ Special damages may be recovered as a branch of actual damages when actual pecuniary loss has been sustained and the same is specially pleaded and proved.⁷⁴ As to punitive damages there is some difference of opinion as to whether they may be given in all cases where the publication is false and malicious, or whether there must be proof of express malice. As a

71—*Duncan v. Griswold*, 92 Ky. 546, 18 S. W. 354; *Squires v. Wason Mfg. Co.*, 182 Mass. 137, 65 N. E. 32; *Butts v. Long*, 106 Mo. App. 313, 80 S. W. 312; *Harriss v. Sneed*, 101 N. C. 273, 7 S. E. 801; *Boulton v. Shields*, 3 U. C. Rep. 21.

72—See ante, p. *208. The action is founded on malice. *Walkley v. Bostwick*, 49 Mich. 374; *Meyrose v. Adams*, 12 Mo. App. 329; *Dodge v. Colby*, 37 Hun, 515. An action for slander of title to letters patent will lie. *Andrew v. Deshler*, 45 N. J. L. 167; *Meyrose v. Adams*, 12 Mo. App. 329. And to a trademark and it survives. *Hotchard v. Mège*, L. R. 18 Q. B. D. 771. If the words are spoken by a stranger the law implies malice; otherwise if by one interested in it and for his own

protection. *Andrew v. Deshler*, 45 N. J. L. 167.

73—*Childers v. Mercury Printing & Pub. Co.*, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; *Stallings v. Whittaker*, 55 Ark. 494, 18 S. W. 829; *Cahill v. Murphy*, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88; *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129; *Republican Pub. Co. v. Mossman*, 15 Colo. 399, 24 Pac. 1051; *Lehrer v. Elmore*, 100 Ky. 56, 37 S. W. 292; *Louisville Press Co. v. Fennelly*, 105 Ky. 365, 49 S. W. 15; *Long v. Tribune Printing Co.*, 107 Mich. 207, 65 N. W. 108; *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 611; *Kidder v. Bacon*, 74 Vt. 263, 52 Atl. 322.

74—*Childers v. Mercury Printing & Pub. Co.*, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

general rule, if the words are actionable *per se*, the plaintiff is entitled to punitive damages.⁷⁵ The amount of general or punitive damages rests in the sound discretion of the jury.⁷⁶

Miscellaneous. An action does not lie for the defamation of a deceased person.⁷⁷ Where a person was libeled in a will, it was held he could file a claim in the probate court against the estate, based on the libel and that the court had jurisdiction to adjudi-

75—See *Stallings v. Whittaker*, 55 Ark. 494, 18 S. W. 829; *St. Ores v. McGashen*, 74 Cal. 148, 15 Pac. 452; *Childers v. Mercury Printing & Pub. Co.*, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; *Taylor v. Hearst*, 118 Cal. 366, 50 Pac. 541; *Republican Pub. Co. v. Conroy*, 5 Colo. App. 262, 38 Pac. 423; *Osborne v. Troup*, 60 Conn. 485, 23 Atl. 157; *Heintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Louisville Press Co. v. Fennelly*, 105 Ky. 365, 49 S. W. 15; *Gambrell v. Schooley*, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87; *Crane v. Bennett*, 77 App. Div. 102, 79 N. Y. S. 66; *Brandt v. Morning Journal Ass.*, 81 App. Div. 183, 80 N. Y. S. 1002. "It has been a long and well established rule in this state, that for wrongs, the commission of which subjects the wrong-doer to both a criminal prosecution and a civil action, exemplary damages cannot be assessed." *Wabash Printing & Pub. Co. v. Cramrine*, 123 Ind. 89, 93, 21 N. E. 904.

76—*Bishop v. Journal Newspaper Co.*, 168 Mass. 327, 47 N. E. 119; *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 611. As to mitigation of damages see *St. Ores v. McGashen*, 74 Cal. 148, 15 Pac. 452; *Hearne v. De Young*, 132

Cal. 357, 64 Pac. 576; *Jones v. Murray*, 167 Mo. 25, 66 S. W. 981; *Stuart v. News Pub. Co.*, 67 N. J. L. 317; *Turton v. N. Y. Recorder Co.*, 144 N. Y. 144, 38 N. E. 1009; *Democrat Pub. Co. v. Jones*, 83 Tex. 302, 18 S. W. 652. Mitigating circumstances may be pleaded and proved "which, while not proving the truth of the libelous charge, yet are connected with or bear upon it, and are of such a nature as tend in some reasonable degree towards such proof, so as to permit of an inference that the defendant was not actuated by actual malice in making the charge,—such as tend to show that, although mistaken, the defendant yet believed, on reasonable grounds, the charge to be true." *Adamson v. Raynor*, 94 Wis. 243, 248, 68 N. W. 1000. The plaintiff may show the wealth of the defendant. *Barkley v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413. But this rule does not apply when the defendant is a corporation. *Randall v. Evening News Co.*, 97 Mich. 136, 56 N. W. 361.

77—*Bradt v. New Nonpareil Co.*, 108 Ia. 449, 79 N. W. 122, 45 L. R. A. 681; *Wellman v. Sun Printing & Pub. Co.*, 66 Hun, 331, 21 N. Y. S. 577; *Sorenson v. Balaban*, 11 App. Div. 164, 32 N. Y. S. 91.

cate upon it.⁷⁸ Where an article contains several libelous expressions each one is held to constitute a separate cause of action.⁷⁹ The action for slander or libel is transitory.⁸⁰ Equity will not restrain the publication of a libel against the person,⁸¹ or against title,⁸² but the publication of a libel upon property has been enjoined.⁸³

78—Gallagher's Estate, 10 Pa. Florence Mfg. Co., 114 Mass. 69; Dist. Ct. 733. De Wick v. Dobson, 18 App. Div.

79—Candrian v. Miller, 98 Wis. 399, 46 N. Y. S. 390; Kidd v. Horry, 28 Fed. 773.

80—Cassem v. Galvin, 53 Ill. App. 419; Crashley v. Press Pub. Burner Co., 110 Mo. 492, 19 S. W. Co., 179 N. Y. 27, 71 N. E. 258. 804, 33 Am. St. Rep. 476, 16 L.

81—Everett Piano Co. v. Bent, R. A. 243.

82—Marlin Fire Arms Co. v Shields, 68 App. Div. 88, 74 N. App. 558; Boston Diatite Co. v. Y. S. 84.

INJURIES TO FAMILY RIGHTS.

Family Rights. In a previous chapter it has been said that the common law, while it took notice of rights pertaining to certain relations of life, did not recognize the family, as such, as constituting a legal entity, and as having rights as an association of persons.¹ The reasons for this are to be found in the barbarous condition of society when the common law was forming; a condition when physical force counted for very much more than now, when serfdom and villenage very largely prevailed, and when wife and children were to husband and father rather servants and dependents than equals, and were expected to look to him for protection against wrongs at the hands of others. The husband and father, in a primitive state of society, is naturally regarded as the representative of the family, and rights in which all are concerned may be expected to find their best protection through him. Social changes have been going on more rapidly in modern times than the modification of legal principles, and the common law of family rights is, in most particulars, not greatly different now from what it was when it tolerated a man in inflicting personal chastisement on his wife or his marriageable daughter.

Wrongs to the Husband. While thus the husband and father was recognized as the head and representative of the family, it was impossible, in some cases, that the ordinary remedies for civil injuries should be allowed as between the various members. How, for instance, was the husband to have civil redress for any wrong suffered at the hands of the wife? He could not have it by way of award of damages, for the wife's property, so far as it was personal, and the usufruct and enjoyment of it, so far as it was real, was transferred to the husband by the marriage.

1—Ante, p. *44.

For gross breaches of the marriage covenant* the spiritual courts might decree a separation, and the supreme legislative authority might dissolve the marriage relation; but other civil redress the husband could not have. He must protect his rights as husband by physical restraint or correction.

The right of the husband to inflict personal chastisement upon the wife has probably entirely passed away.² There are, indeed, some recognitions of it within a few years last past, but the spirit of the age rejects it as a reminiscence of barbarism.³ It cannot be affirmed that an action can be sustained by the wife for an assault upon her by the husband, but such an assault would be taken notice of by the criminal law as an offense against the State.⁴ And from any forcible restraint put upon the actions of the wife, and which would constitute an imprisonment, the wife might have relief on *habeas corpus*.

If we direct attention to the remedies which, at the common law, the husband might have against third persons, for a violation of his rights as husband, we find them all grounded upon or permeated with the ideas which mark their origin in a rough and uncultivated society.

2—*Peannan v. Peannan*, 1 Swab. & Trist. 609; *People v. Winters*, 2 Park, C. R. 10; *Commonwealth v. McAfee*, 108 Mass. 458, 11 Am. Rep. 383. The husband has no right to compel his wife by force to obey his wishes. *Carpenter v. Commonwealth*, 92 Ky. 452, 18 S. W. 9.

3—In *State v. Rhodes*, 1 Phil. (N. C.) 453, 98 Am. Dec. 78, it is said that, although the laws of the state do not recognize the right of the husband to whip his wife, yet that the courts will not interfere to punish him for moderate correction of her, even though there had been no provocation. One is naturally a little curious to know what can be moderate correction where there has

been no fault. In *Poor v. Poor*, 8 N. H. 307, 313, RICHARDSON, Ch. J., says: "Whatever the old books may say upon the subject, there never was, in my opinion, in the relation between husband and wife, when rightly understood, anything that gave to the husband the right to reduce a refractory wife to obedience." In the same case, however, the judge says that when the wife "is ill treated on account of her own misconduct, her remedy is in a reform of her manners, unless the return from the husband is wholly unjustified by the provocation, and quite out of proportion to the offense." p. 316.

4—*Carpenter v. Commonwealth*, 92 Ky. 452, 18 S. W. 9.

1. He might have redress against third persons for an injury suffered by him in respect to the property which the wife had brought him. But as such redress would rest upon principles which are common to other cases, it calls for no special comment here.

2. He might have a special action on the case against one who should seduce his wife or entice her away from *him.⁵ [*263] The ground of such an action is the infliction upon the husband of some one or more of the following injuries: 1. Dishonor of the marriage bed. 2. Loss of the wife's affections.⁶ 3. Loss of the comfort of the wife's society. 4. Total loss of the wife's services where she absconds from the husband,

5—*Winsmore v. Greenbank*, Willes, 577; *Weedon v. Timbrell*, 5 T. R. 357; *Rabe v. Hanna*, 5 Ohio, 530; *Preston v. Bowers*, 13 Ohio St. 1; *Hadley v. Heywood*, 121 Mass. 236; *Barbee v. Armistead*, 10 Ired. 530, 51 Am. Dec. 404; *Cröse v. Rutledge*, 81 Ill. 266; *Conway v. Nicol*, 34 Iowa, 533; *Shannon v. Swanson*, 208 Ill. 52, 69 N. E. 869; *Long v. Booe*, 106 Ala. 570, 17 So. 716; *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266; *Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656; *Christensen v. Thompson*, 123 Ia. 717, 99 N. W. 591; *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006; *Cornelius v. Ham-bay*, 150 Pa. St. 359, 24 Atl. 515; *Matheis v. Mazet*, 164 Pa. St. 580, 30 Atl. 434. The fact that the defilement was forcible, and a crime does not bar the action. *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260. Nor does the wife's consent. *Wales v. Miner*, 89 Ind. 118. But it may reduce damages. *Ferguson v. Smethers*, 70 Ind. 519, 13 Am. Rep. 186. Recovery may be had

for loss of *consortium*, implied in crim. con., whether the intercourse is with or against her will and although no loss of service results. *Bigaouette v. Paulet*, 134 Mass. 123. No recovery can be had by the husband for loss of reputation and honor of his children. *Ferguson v. Smethers*, 70 Ind. 519. The action may be brought after a divorce from the wife. *Wood v. Matthews*, 47 Ia. 409; *Wales v. Miner*, 87 Ind. 118. Where the gist of the action is crim. con. no recovery can be had for loss of service, etc., unless the crim. con. is proved. *Wood v. Matthews*, 47 Ia. 409. There must be proof of actual marriage to maintain the action. *Keppler v. Elser*, 23 Ill. App. 643.

6—In *Heermance v. James*, 47 Barb. 120, an action was sustained by a husband against one who was alleged to have poisoned and prejudiced the mind of his wife against him, alienated her affections, counseled and aided her to commence proceedings for divorce, whereby she refused to recognize or receive him as her

and probable diminished value of services where she does not.

5. The mortification and sense of shame that must usually accompany this most serious of domestic wrongs. The extent of the injury in any case must depend in great measure upon the previous relations of the parties.⁷ If these were cordial and affectionate, and such as are expected to exist when a suitable marriage has been formed under a proper sense of the obligations and responsibilities that belong to it, the wrong of the seducer who succeeds in withdrawing the wife's affections from her husband, and induces her *to live with [*264] him a life of shame, it is impossible adequately to measure. If, on the other hand, the husband was a libertine, and has brought shame upon his family by his own notorious misconduct, and if the wife, after the destruction of her affection by his own abuse and misconduct, has finally surrendered her own honor, it is difficult to understand what claim he can have to legal consideration. And between these extreme cases there may be numerous others differing so widely in their facts that, while it may be wise to give a right of action in all, yet the measure of redress must be left largely to the discretion of the proper legal tribunal, which shall be at liberty to award much or little, according as they find that much or little has been lost by the complaining party.⁸ And even though the husband may himself have been chargeable with no wrong in his marital relations, yet if the wife's affections were withdrawn from him before the de-

husband, though she did not abandon him. The judge says her remaining with him under the circumstances "would rather add the provocation of insult to the keenness of suffering. It would continue before him a present, living, irritating, aggravating, if not consuming, source of grief, which even her absence might in a measure relieve." So where a divorce is procured though for the husband's fault, if without defendant's interference none would

have been sought. *Modisett v. McPike*, 74 Mo. 636.

7—*Matheis v. Mazet*, 164 Pa. St. 580, 30 Atl. 434.

8—The bad character of the husband will not mitigate damages, unless he be guilty of unchastity or other wrong to the wife herself. *Norton v. Warner*, 9 Conn. 172. The husband's ill treatment of the wife and infidelity are no bar to the action but may go in mitigation of damages. *Cross v. Grant*, 62 N. H. 675;

fendant is chargeable with interference, the fact is important as bearing upon the question of damages.⁹ The action for seducing the wife away from the husband is by no means confined to the case of improper and adulterous relations; but it extends to all cases of wrongful interference in the family affairs of others whereby the wife is induced to leave the husband, or to so conduct herself that the comfort of the married life is destroyed. If, however, the interference is by the parents of the wife, on an assumption that the wife is ill treated to an extent that justifies her in withdrawing from her husband's *society [*265] and control, it may reasonably be presumed that they have acted with commendable motives, and a clear case of want of justification may be justly required to be shown before they should be held responsible.¹⁰ One who merely harbors

Browning v. Jones, 52 Ill. App. 597. Punitive damages may be awarded. *Cornelius v. Hambay*, 150 Pa. St. 359, 24 Atl. 515; *Mathais v. Mazet*, 164 Pa. St. 580.

9—The wife's letters or statements may be proved to show the previous state of their relations, and of her feelings towards her husband. *Willis v. Bernard*, 8 Bing. 376; *Gilchrist v. Bale*, 8 Watts, 355, 34 Am. Dec. 469; *Palmer v. Crook*, 7 Gray, 418; *Holtz v. Dick*, 42 Ohio St. 23. See, *White v. Ross*, 47 Mich. 172. In *Hadley v. Heywood*, 121 Mass. 236, 239, it is said that "any unhappy relations existing between the plaintiff and his wife, not caused by the conduct of the defendant, may affect the question of damages, and were properly submitted to the jury; but they were in no sense a justification or palliation of the defendant's conduct. They are not allowed to affect the damages because the acts of the defendant are less

reprehensible, but because the conduct of the husband is such that the injury which such acts occasion is less than otherwise it might have been." One who receives a wife to his home who was treated with cruelty by her husband, cannot recover from the husband for her support if one of his motives in receiving her was to facilitate adulterous intercourse. *Almy v. Wilcox*, 110 Mass. 443.

It is no defense to the action that the plaintiff has forgiven his wife, or that he has cohabited with her since the wrong. *Shannon v. Swanson*, 208 Ill. 52, 69 N. E. 869; *Sikes v. Tippins*, 85 Ga. 231, 11 S. E. 662; *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006. Nor that he has compromised and settled with another person who had also committed adultery with his wife. *Shannon v. Swanson*, 208 Ill. 52, 69 N. E. 869.

10—*Hutcheson v. Peck*, 5 Johns. 196; *Bennett v. Smith*, 21 Barb.

a wife who, without his consent, has left her husband, and thereby encourages her in withholding from him the performance of marital duties, will be liable for so doing if she left without justification, but not otherwise.¹¹

Husband's Remedy for Injury to Wife. For an injury to the wife, either intentionally or negligently caused, which de-

439; *Campbell v. Carter*, 3 Daly, 165; *Holtz v. Dick*, 42 Ohio St. 23, 5 Am. Rep. 791; *Zimmerman v. Whiteley*, 134 Mich. 39, 95 N. W. 989. In *Oakman v. Belden*, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396, the court says: "A parent may not with hostile, wicked or malicious intent break up the relations between his daughter and her husband. He may not do this simply because he is displeased with the marriage, or because it was against his will, or because he wishes the marriage relation to continue no longer. But a parent may advise his daughter, in good faith, and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him. A parent may, in such case persuade his daughter. He may use proper and reasonable arguments, drawn, it may be, from his greater knowledge and wider experience. Whether the motive was proper or improper is always to be considered. Whether the persuasion or the argument is proper and reasonable, under the conditions presented to the parent's mind, is also always to be considered. It

may turn out that the parent acted upon mistaken premises, or upon false information, or his advice and his interference may have been unfortunate; still, we repeat, if he acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband." p. 282.

If a father removes the wife, unable from illness to leave herself, at her request, acting in good faith upon complaints of cruelty made by the wife, he is justified, even if the husband's conduct was in fact not improper. *Smith v. Lyke*, 13 Hun, 204. See *White v. Ross*, 47 Mich. 170. See *post*, pp. 479, 480, for suits by wife against husband's parents for alienating his affections.

11—*Phillip v. Squire*, Peake, N. P. 82; *Barnes v. Allen*, 30 Barb. 663. A stranger may give a wife continued shelter and support her against her husband's will only when her husband's violence endangers her personal safety. *Johnston v. Allen*, 100 N. C. 131, 5 S. E. 666. If one estrange a wife's affection he is liable, although there is no elopement or adultery. *Rinehart v. Bills*, 82 Mo. 534, 52 Am. Rep. 388. So if one takes away a wife with her consent and against her husband's. *Higham v. Vanosdol*, 101 Ind. 160.

prives her of the ability to perform services, or lessens that ability, the husband may maintain an action for the loss of service, and also for any incidental loss or damage, such as moneys expended in care and medical treatment, and the like.¹² But if the injury resulted in her death, this cannot, at the common law, be taken into account, either as the ground of action or [*266] as an aggravation of *damages, and the husband's recovery must be limited to the loss suffered intermediate the injury and death.¹³

A personal injury to the wife gives rise to two causes of action, one in favor of the wife to recover for the physical injury, the pain and suffering, expense, if any, paid from her own estate and loss of earning capacity, where she has a right to her

12—*Matteson v. N. Y. Cent. R. Co.*, 35 N. Y. 487; *Hopkins v. Atlantic, etc., R. R. Co.*, 94 U. S. 11; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Kavanaugh v. Janesville*, 24 Wis. 618; *Smith v. St. Joseph*, 55 Mo. 456, 17 Am. Rep. 660; *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557, 570; *McKinney v. Stage Co.*, 4 Iowa, 420; *Mowry v. Chaney*, 43 Iowa, 609; *Berger v. Jacobs*, 21 Mich. 215; *Matthew v. Centr. Pac. R. R. Co.*, 63 Cal. 450; *Bloomington v. Annett*, 16 Ill. App. 199; *Southern Ry. Co. v. Crowder*, 135 Ala. 417, 33 So. 335; *Birmingham Southern Ry. Co. v. Lintner*, 141 Ala. 420; *Martin v. Southern Pac. Co.*, 130 Cal. 285, 62 Pac. 515; *Collins Park, etc., R. R. Co. v. Ware*, 112 Ga. 663, 37 S. E. 975; *Indianapolis St. Ry. Co. v. Robinson*, 157 Ind. 414, 61 N. E. 936; *Southern Kan. Ry. Co. v. Pavey*, 57 Kan. 521, 46 Pac. 969; *Kelley v. New York, etc., R. R. Co.*, 168 Mass. 308, 46 N. E. 1063, 60 Am. St. Rep. 397, 38 L. R. A. 631; *Furnish v. Missouri Pac. Ry. Co.*, 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800; *Riley v. Lidtke*, 49 Neb. 139, 68 N. W. 356, 59 Am. St. Rep. 526; *Baltimore, etc., Ry. Co. v. Glenn*, 66 Ohio St. 395, 64 N. E. 438; *Sellek v. Janesville*, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691. Such action survives to the husband's representatives. *Cregin v. Brooklyn, etc., Co.*, 75 N. Y. 192. In it a husband may recover for loss of society. *Jones v. Utica, etc., Co.*, 40 Hun, 349. In Iowa he may recover if the wife is a mere housewife, not if she follows an independent employment. *Fleming v. Shenandoah*, 67 Ia. 505, 56 Am. Rep. 354. In Pennsylvania he may recover in such an action for loss of service, expenses, etc. *Nanticoke v. Warne*, 106 Pa. St. 373; but in his action for his wife's use there can be no recovery for loss of earning power. *King v. Thompson*, 87 Pa. St. 365, 30 Am. Rep. 364.

13—*Hyatt v. Adams*, 16 Mich. 180. See *Pack v. New York*, 3 N. Y. 489.

earnings and is engaged in business or labor on her own account, and one in favor of the husband to recover for loss of his wife's services, society, etc., and for any expense incurred.¹⁴ Where one against the protest of the husband and with knowledge of the use made of it, sold laudanum to the wife, which she used as a beverage whereby she was wrecked in mind and body and the husband was deprived of her service and companionship, he was held liable to the husband for the damages sustained by him.¹⁵

The term services, when employed to indicate the ground on which the husband is allowed to maintain an action, is used in a peculiar sense, and fails to express to the common mind the exact legal idea intended by it. Whatever may have been the case formerly, or may now be the case in some states of society, service, in the sense of labor or assistance, such as a servant might perform or render, is not always given by or expected from the wife; and if an action were to put distinctly in issue the loss of such services, it might, perhaps, be shown in the most serious cases that there was really no loss at all. But it could not be reasonable that the wrong-doer should escape responsibility because the family he has wronged were in such circumstances, moved in such circles, and were subject to such claims, by reason of public position or otherwise, that physical labor by the wife was neither expected nor desired. The word service has come to us in this connection from the times in which the action originated, and it implies whatever of aid, assistance, comfort and society the wife would be expected to render to or bestow upon her husband, under the circumstances and in the condition in which they may be placed, whatever those may be. That services in the ordinary sense were not rendered at all would be immaterial and irrelevant, except as the fact might, under some circumstances, tend to show a want of conjugal regard and affection, and thereby

14—Denver Con. Tramway Co. *lette*, 41 Neb. 578, 59 N. W. 921; *v. Riley*, 14 Colo. App. 132, 59 Pac. Fink *v. Campbell*, 70 Wis. 664, 17 476; *Thompson v. Metropolitan* N. W. 325.
St. Ry. Co., 135 Mo. 217, 36 S. W. 15—*Holleman v. Harvard*, 119 625; *Omaha, etc., Ry. Co. v. Chol* N. C. 150, 25 S. E. 972, 56 Am.

tend to mitigate the damages.¹⁶ The action by the husband will lie, though by statute the wife has full control of her separate property and earnings, the same right to labor and engage in business on her own account that he has and may sue alone for injuries to her person.¹⁷

Actions by the Wife. For an injury suffered by the wife in her person, such as would give a right of action to any other per-

St. Rep. 672, 34 L. R. A. 803. So where the sale was secretly made to the wife with similar results. *Hoard v. Peck*, 56 Barb. 202.

16—Paragraph quoted and approved. *Long v. Booe*, 106 Ala. 570, 17 So. 716. The matter is well stated in *Denver Con. Tramway Co. v. Riley*, 14 Colo. App. 132, 59 Pac. 476, as follows: "What these were worth in money was not shown; and, upon a little reflection, it is apparent that it could not be. The companionship and society of the wife are not articles of commerce. They cannot be weighed or measured; they are not bought and sold, and no expert is competent to testify to their value. The consideration upon which they are bestowed is not pecuniary. Yet the husband is entitled to compensation in money for their loss, and the amount of that compensation is to be determined by the jury, not from evidence of value, but from their own observation, experience and knowledge, conscientiously applied to the facts and circumstances of the case. So also in relation to the services of the wife. The wife does not occupy the position of a servant, and her services to her husband are not those of a servant. She makes his home cheerful and in-

viting, and ministers to his happiness in a multitude of ways outside of the drudgery of household labor. All the work of the house may be done by hired employees, and her services still give character to the home. They are not rendered in accordance with set rules; they are not repeated in regular order from day to day; they have their source in the thoughtfulness of the wife, and her regard for her husband, and no witness is qualified to define them, or reduce them to a list, or say what they are worth, so that their value must also be estimated by the jury." pp. 139, 140. Similar views are expressed in *Furnish v. Missouri Pac. Ry. Co.*, 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800; *Riley v. Lidtke*, 49 Neb. 139, 68 N. W. 356, 59 Am. St. Rep. 526; *Sellek v. Janesville*, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691. Perhaps if a voluntary separation has taken place between husband and wife, which, by their agreement, is to be permanent, no action at all can be sustained. *Fry v. Derstler*, 2 Yeates, 278.

17—*Southern Ry. Co. v. Crowder*, 135 Ala. 417, 33 So. 335; *Kelley v. New York, etc., R. R. Co.*, 168 Mass. 308, 56 N. E. 1063, 60 Am. St. Rep. 397, 38 L. R. A. 631;

son, a suit might be instituted in the joint name of the husband and wife.¹⁸ This suit would be distinct from that which the husband might institute for the loss of services and expenses, and would embrace damages for physical and mental suffering.¹⁹ The damages recovered, however, would belong to *the husband alone. This rule appears to be changed by the [*267] statutes of some of the States, which, in excluding the husband's common law interest in the real and personal estate of the wife, are held to take from him the right to compensation for the torts suffered by her.²⁰ Under statutes permitting the wife to labor and trade on her own account, it is held in Massachusetts that she may recover on account of the impairment of her capacity to labor.²¹ But in other States it is held that, notwithstanding such statutes, the wife's time presumptively be-

Birmingham Southern Ry. Co. v. Morris, 37 Ohio St. 10, 41 Am. Lintner, 141 Ala. 420.

18—McFadden v. Santa Ana, etc., Ry. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Snashall v. Metropolitan R. R. Co., 8 Mackey, 399, 10 L. R. A. 746; Wolf v. Banereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680. If the husband has abandoned the wife and abjured the realm, she may sue alone. Wolf v. Banereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680; Sanborn v. Sanborn, 104 Mich. 180, 62 N. W. 371. So in some cases if she is living separate from her husband. Baldwin v. Second St. Cable R. R. Co., 77 Cal. 390, 19 Pac. 641.

19—Dengate v. Gardiner, 4 M. & W. 6; Hyatt v. Adams, 16 Mich. 180; Thompson v. Metropolitan St. Ry. Co., 135 Mo. 217, 36 S. W. 625; Omaha, etc., Ry. Co. v. Chollette, 41 Neb. 578, 59 N. W. 921; Fink v. Campbell, 70 Wis. 664, 17 N. W. 325. The wife may now sue alone for injuries. Stevenson v.

Morris, 37 Ohio St. 10, 41 Am. Rep. 481; Matthew v. Centr. Pac. R. R. Co., 63 Cal. 450; Bloomington v. Annett, 16 Ill. App. 199.

20—Mich. Cent. R. R. Co. v. Coleman, 28 Mich. 440; Musselman v. Galligher, 32 Iowa, 383; Pancoast v. Burnell, 32 Iowa, 394; Chicago, etc., R. R. Co. v. Dunn, 52 Ill. 260; Hayner v. Smith, 63 Ill. 430, 14 Am. Rep. 124; Henries v. Vogel, 66 Ill. 401. It is held in Maine that an action by husband and wife for an injury to the wife survives on her death in favor of her personal representative. Norcross v. Stuart, 50 Me. 87. See, also, Crozier v. Bryant, 4 Bibb, 174; Pattee v. Harrington, 11 Pick. 221. At the common law the action would have abated under such circumstances, but on the death of the husband, the wife surviving, it would have survived to her.

21—Jordan v. Middlesex, etc., Co., 138 Mass. 425; Harmon v. Old Colony R. R. Co., 165 Mass. 100,

longs to the husband, and that she cannot recover such damages unless she is actually engaged in a business of her own.²²

For a personal tort by the husband to her person or reputation, the wife can sustain no action, and she must rely upon the criminal laws for her protection, or seek relief in separation or in proceedings for a divorce. But where, by statute, the wife is given full dominion and control of the property purchased or otherwise acquired by her, the marital relation *would [*268] not protect the husband against an action for any unlawful interference with the property.²³ But even under these statutes the wife cannot maintain an action against her husband for a personal injury.²⁴ Even after divorce the wife cannot sue the husband for a personal tort committed by him upon her while the relation existed.²⁵

A wife cannot recover damages on account of personal injur-

42 N. E. 505, 52 Am. St. Rep. 499, 30 L. R. A. 658. See also *Atchison, etc., R. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453.

22—*Dickens v. Des Moines*, 74 Ia. 216, 37 N. W. 165; *Uromsky v. Dry Dock, etc., R. R. Co.*, 118 N. Y. 304, 23 N. E. 451, 16 Am. St. Rep. 759; *Richmond Ry. & Elec. Co. v. Bowles*, 92 Va. 738, 24 S. E. 388; *Atlantic, etc., R. R. Co. v. Ironmonger*, 95 Va. 625, 29 S. E. 319.

23—*Emerson v. Clayton*, 32 Ill. 492; *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578; *Chestnut v. Chestnut*, 77 Ill. 346; *Starkweather v. Smith*, 6 Mich. 377; *Larison v. Larison*, 9 Ill. App. 27; *Bruce v. Bruce*, 95 Ala. 563, 11 So. 197; *Cook v. Cook*, 125 Ala. 583, 27 So. 918, 82 Am. St. Rep. 264; *Gillespie v. Gillespie*, 64 Minn. 381, 67 N. W. 20. She may maintain replevin if living apart from him. *White v. White*, 58 Mich. 546; *Howland v. Howland*, 20 Hun,

472. The husband, where such statutes exist, cannot bring trover against a third person for the conversion of the wife's property.

Taylor v. Jones, 52 Ala. 78. The husband may bring replevin against his wife. *Carney v. Gleissner*, 62 Wis. 493. But, in Michigan, he may not abandon her and obtain by replevin household goods, exempt from execution and on which a mortgage is not valid without his wife's signature. *Smith v. Smith*, 52 Mich. 538.

24—*Peters v. Peters*, 42 Iowa, 182; *Longendyke v. Longendyke*, 44 Barb. 366; *Schultz v. Schultz*, 89 N. Y. 644. And it seems the husband is still liable for the carrying on by the wife of an illegal business on her own account. *Commonwealth v. Barry*, 115 Mass. 146; S. C. 2 Green Cr. Rep. 285, and note.

25—*Longendyke v. Longendyke*, 44 Barb. 366; *Peters v. Peters*, 42

ies to her husband whereby she sustains loss of support and of consortium and is compelled to care for him while sick.²⁶

Action by Wife for Alienation of Husband's Affections.

This wrong to the wife has been the subject of much strenuous litigation, since the second edition of this work was published. In that edition Judge Cooley dismisses the subject with the following sentence and note subjoined: It is also generally supposed that the wife can have no action against one who should seduce the husband's affections from her, or in any manner deprive her of his care and society.²⁷ At least twenty States now hold that such an action may be maintained, some basing their

Iowa 182; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 589; *Nickerson v. Nickerson*, 65 Tex. 281; *Phillips v. Barnett*, 1 Q. B. Div. 436; S. C. 17 Moak, 100. These were trespass for assault and battery committed while the marriage relation existed, and action brought after divorce. So for communicating a venereal disease. *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 72 Am. St. Rep. 550, 40 L. R. A. 757. *Freethy v. Freethy*, 42 Barb. 641, was an action of slander brought under like circumstances.

26—*Goldman v. Cohen*, 31 Misc. 36, 65 N. Y. S. 406. No suit will lie by the wife against the husband on a written contract by which they agree to ignore past differences, to live together in peace and harmony and observe faithfully the marriage relation, and the wife agrees to keep the home and family in a comfortable and reasonably good condition and the husband agrees to provide for the necessary expenses of the family and to pay the wife in addition the sum of

\$200 a year as long as she observes the agreement. *Miller v. Miller*, 78 Ia. 177, 42 N. W. 641, 16 Am. St. Rep. 431. The contract was held void for want of consideration, the wife agreeing to do only what it was her duty to do, and also as against public policy, for the reason that judicial inquiry into matters of that sort between husband and wife, would be fraught with irreparable mischief.

27—2 Kent, 182; *Reeve, Dom. Rel.* 110; *Lynch v. Knight*, 9 H. L. Cas. 577. This was an action by the wife, the husband being joined for conformity, against one who had said of her that she was "almost seduced" by a third person named, before her marriage, in consequence of the uttering of which words her husband refused to live with her. The special damage alleged was the loss of the *consortium* of the husband. The court of Queen's Bench in Ireland sustained the action, and its judgment being affirmed in the Exchequer Chamber by a divided court, was removed thence to the

conclusion upon common law principles and some more or less upon the various enabling statutes in favor of married women, which have been passed in recent years.²⁸ In the case cited from Connecticut the decision is based on common law grounds and

House of Lords. Lord Chancellor CAMPBELL held that the action might have been maintained had the act of the husband, in refusing to live with his wife, been reasonable under the circumstances, which, in his opinion, it was not. Lord CRANWORTH expressed his concurrence, but Lord WENSLEYDALE denied that an action for the loss of *consortium* from the wrongful act of the defendant would lie in any case. The judgment was reversed. We see no reason why such an action should not be supported, where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her; and it is held she may maintain an action in her own name for alienating the husband's affections and causing a separation. *Breiman v. Paasch*, 7 Abb. N. C. 249; *Warner v. Miller*, 17 Abb. N. C. 221; *Jaynes v. Jaynes*, 39 Hun, 40; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13. So if the husband sends away the wife. *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397. But in Indiana it is held otherwise on the ground that it is not an injury to the person. *Logan v. Logan*, 77 Ind. 558.

28—*Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847; *Humphrey v. Pope*, 1 Cal. App. 374; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829; *Betser v. Betser*, 186 Ill. 537, 58 N. E. 249, 78 Am. St. Rep. 303, 52 L. R. A. 630; *Haynes v. Newlin*, 129 Ind. 581, 29 N. E. 389, 28 Am. St. Rep. 213; *Wolf v. Wolf*, 130 Ind. 599, 30 N. E. 308; *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. 99; *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119; *Price v. Price*, 91 Ia. 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150; *Ruth v. Zimbleman*, 99 Ia. 641, 68 N. W. 895; *Childs v. Muckler*, 105 Ia. 279, 75 N. W. 100; *Deitzman v. Deitzman*, 108 Ky. 610, 57 S. W. 247, 50 L. R. A. 808, 94 Am. St. Rep. 390; *Eagon v. Eagon*, 60 Kan. 697, 57 Pac. 942; *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492; *Wolf v. Frank*, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; *Warren v. Warren*, 89 Mich. 123; *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468; *Nichols v. Nichols*, 134 Mo. 187, 35 S. W. 577; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N. W. 577, 47 Am. St. Rep. 759, 27 L. R. A. 120; *Seaver v. Adam*, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Manwarren v. Mason*, 79 Hun, 592, 29 N. Y. S. 915; *Van Olinda v. Hall*, 88 Hun, 452, 34 N. Y. S. 777; *Romaine v. Decker*, 11 App. Div.

the question is given very careful and elaborate consideration. The court says: "Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society; the husband to the wife all that the wife owes to him. Upon principle this right in the wife is equally valuable to her as property, as is that of the husband to him. Her right being the same as his in kind, degree and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him. But from time to time courts, not denying the right of the wife in this regard, not denying that it could be injured, have nevertheless declared that the law neither would nor could devise and enforce any form of action by which she might obtain damages. In 3 Blackstone's Commentaries, 143, the reason for such denial is thus stated: 'The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; therefore the inferior can suffer no loss or injury.' Inasmuch as by universal consent it is of the essence of every marriage contract that the parties thereto shall, in regard to this particular matter of conjugal society and affection, stand upon an equality, we are unable to find any support for the denial in this reason, and the right, the injury, and the consequent damage, being admitted, there comes into operation another rule, namely, that the law will permit no one to obtain redress for wrong except by its

20, 32 N. Y. S. 66; *Buchman v.* 889; *Knapp v. Wing*, 72 Vt. 334, *Foster*, 23 App. Div. 542, 48 N. Y. 47 Atl. 1075; *Beach v. Brown*, 20 S. 732; *Whitman v. Egbert*, 27 App. Div. 374, 50 N. Y. S. 3; *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. S. 804; *Kuhn v. Hermann*, 43 App. Div. 108, 59 N. Y. S. 341; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Gerner v. Gerner*, 185 Pa. St. 233, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L. R. A. 549; *Reading v.* 574; *Sheriff v. Sheriff*, 8 Okl. 124, *Gazzam*, 200 Pa. St. 70, 49 Atl. 56 Pac. 960.

instrumentality, and it will furnish a mode for obtaining adequate redress for every wrong. This rule, lying at the foundation of all law, is more potent than, and takes precedence of, the reason that the wife is in this regard without the pale of the law because of her inferiority.'"²⁹

The gist of the action is the loss of consortium, which includes

29—Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829. And in Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, while it is held that a provision of the Code of Civil Procedure giving the wife the right to prosecute and defend an action as if single, removes all difficulty in the way of the action, it is also argued that the action will lie on common law principles as follows: "The actual injury to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers

and protects. A remedy, not provided by statute but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society unless she also has a right of action for the loss of his society? Does not the principle that 'the law will never suffer an injury and a damage without a remedy' apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does?" pp. 590, 591. See also Deitzman v. Mullin, 108 Ky. 610, 57 S. W. 247, 50 L. R. A. 808, 94 Am. St. Rep. 390; Warren v. Warren, 89 Mich. 123; Beach v. Brown, 20 Wash. 266; 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114.

the husband's society, affection and aid.³⁰ The wife may have the action though she continues to live with her husband,³¹ and it is held that she may maintain it after a divorce from him.³² The action is frequently brought against the husband's parents or one of them and in such case it is necessary to show that the interference was malicious, or from bad motives and without reasonable foundation. "The law has a tender regard for the ties of kinship subsisting between parent and child, and it will not disregard these ties, although the child be married and of full age. When trouble and disagreements arise between the married pair, the most natural promptings of the child direct it to find solace and advice under the parental roof. All legitimate presumption in such cases must be that the parent will act only for

30—*Buchanan v. Foster*, 23 App. Div. 542, 48 N. Y. S. 732; *Reading v. Gazzam*, 200 Pa. St. 70, 49 Atl. 889.

31—*Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829. "It is not a prerequisite to the right of the plaintiff to maintain this suit in her own name that she should have been abandoned by her husband in the literal sense, nor that she should have actually separated herself from him by or without a decree of divorce. If she has suffered the wrong complained of her right to redress is absolute; it cannot be made to depend upon any of these conditions. As long as she keeps her marriage contract, so long she has the right to the conjugal society and affection of her husband. Possibly she may regain these. This possibility is her valuable right. The defendant may not demand that she shall sacrifice it for the future as the price for redress for injuries in the past." p. 11.

32—*Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. 99; *Beach v. Brown*, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114. In some of the New York cases it is held that to support the action, the plaintiff must show some positive act on the part of the defendant in the way of persuading or inducing him to withdraw his society or affection from his wife. "The mere fact that the husband maintains improper relations with the defendant and remains away from his family does not seem to be sufficient to support the action; there must be some active interference on the part of the defendant. The fact that a woman is attractive and submissive is not sufficient. There must be some evidence from which the conclusion can be drawn that she was the pursuer and not merely the pursued." *Buchanan v. Foster*, 23 App. Div. 542, 544, 48 N. Y. S. 732; *Whitman v. Egbert*, 27 App. Div. 374, 50 N. Y. S. 3.

the best interests of the child. The law recognizes the right of the parent in such cases to advise the son or daughter, and when such advice is given in good faith, and results in separation, the act does not give the injured party a right of action. In such a case the motives of the parent are presumed good until the contrary is made to appear."³³

The courts of five States hold that the action will not lie.³⁴ The reasons are cogently stated by the Supreme Court of Maine as follows: "We have been referred to no reliable authority for the existence of such a right, and we can find none. It is true that the husband may maintain an action for the seduction of his wife. But such an action has grounds on which to rest that cannot be invoked in support of a similar action in favor of the wife. A wife's infidelity may impose upon her husband the support of another man's child. And what is still worse, it may throw suspicion upon the legitimacy of his own children. A husband's infidelity can inflict no such consequences upon his wife. If she remains virtuous, no suspicion can attach to the legitimacy of her children. And an action in favor of the husband for the seduction of his wife has been regarded as of doubtful expediency. It has been abolished in England. And the

33—*Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310. To same effect: *Huling v. Huling*, 32 Ill. App. 519; *Eagon v. Eagon*, 60 Kan. 697, 57 Pac. 942; *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; *Pollock v. Pollock*, 9 Misc. 82, 29 N. Y. S. 37; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; *Sheriff v. Sheriff*, 8 Okl. 124, 56 Pac. 960; *Gerner v. Gerner*, 185 Pa. St. 233, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L. R. A. 549. And see ante p. 437, n. 88. It follows that if the interference is wrongful, that is not in good faith, and from improper motives, an action lies. *Railsback v. Railsback*, 12 Ind.

App. 659, 40 N. E. 276, 1119; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947.

34—*Doe v. Doe*, 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 833; *Morgan v. Martin*, 92 Me. 190, 42 Atl. 354; *Neville v. Gile*, 174 Mass. 305, 54 N. E. 841; *Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843, 75 Am. St. Rep. 351, 47 L. R. A. 310; *Hodge v. Wetzler*, 69 N. J. L. 490, 55 Atl. 49 (Supreme Court); *Smith v. Smith*, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, 20 Am. St. Rep. 79, 8 L. R. A. 420; *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961.

trials we have had in this country of such actions are not very encouraging. They seem better calculated to inflict pain upon the innocent members of the families of the parties than to secure redress to the person injured. And we fear such would be the result if such actions were maintainable by wives. Such a power would furnish them with the means of inflicting untold misery upon others with little hope of redress for themselves. At any rate, we are satisfied that the law never has, and does not now, secure to wives such a power, and if it is deemed wise that they should have it, the legislature and not the court must give it to them.'³⁵

Action by the Parent. The injury which one may suffer in the relation of parent seems, at the common law, to be limited to an action for the recovery of damages for being deprived of the child's services. The action is therefore planted rather upon a loss in the character of the master of a servant than in that of the head of a family. This sometimes leads to results which are extraordinary, for it seems to follow, as a necessary consequence, that if the child, from want of maturity or other cause, is incapable of rendering service, the parent can suffer no pecuniary injury, and therefore can maintain no action when the child is abducted or injured. Such have been the decisions.³⁶

*Loss of service to the parent may be occasioned by [*269]

35—*Doe v. Doe*, 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 833.

36—*Hall v. Hollander*, 7 D. & Ry. 133; S. C. 4 B. & C. 660; *Eager v. Grimwood*, 1 W., H. & G. 61; *Grinnell v. Wells*, 7 M. & G. 1033; S. C. 8 Scott N. R. 741. In this last case it is intimated that for the abduction of a helpless child there can be no action, because the child is incapable of performing services. But we doubt the soundness of the doctrine. The services of a child, no more than those of a wife, are to be estimated by the merely physical and

gross standard; they do not consist in the hewing of wood and drawing of water merely, but they are such returns of affection as the child, in his condition, is capable of; and many a parent has been made to feel that these, in the case of afflicted and helpless children, are often beyond all estimate. To abduct a child who, if afterward abandoned and thrown upon the world, will be capable of caring for himself, or be likely to be cared for by others, in the expectation of remuneration by his future labors, is a venial wrong, and a very slight injury,

enticing the child away,³⁷ by forcibly abducting the child,³⁸ by beating or otherwise purposely injuring the child,³⁹ by a negligent injury which disables the child from labor,⁴⁰ and

in comparison with the carrying off of one who, if then abandoned will be presently and prospectively helpless, and therefore abandoned to probable want and misery. Compare *Dennis v. Clark*, 2 Cush. 347, 48 Am. Dec. 671. In any event the parent might recover for trouble and expense in the care, nursing, etc., of the injured child. *Durden v. Barnett*, 7 Ala. 169; *Dennis v. Clark*, *supra*. He may recover for the loss of his time spent in nursing the child. *Connell v. Putnam*, 58 N. H. 534. So may one in *loco parentis*, but not for loss of service without proof of it. *Whitaker v. Warren*, 60 N. H. 20, 49 Am. Rep. 302.

37—And this, whether the child be male or female. *Sherwood v. Hall*, 3 Sumn. 127; *Bundy v. Dodson*, 28 Ind. 295; *Everett v. Sherfey*, 1 Iowa, 356; *Caughey v. Smith*, 47 N. Y. 244; *Plummer v. Webb*, 4 Mason, 380; *Stowe v. Heywood*, 7 Allen, 118; *Sargent v. Mathewson*, 38 N. H. 54; *Hare v. Dean*, 90 Me. 308, 38 Atl. 227; *Arnold v. St. Louis, &c., R. R. Co.*, 100 Mo. App. 470, 74 S. W. 5; *Lawyer v. Fritcher*, 130 N. Y. 239, 29 N. E. 267, 27 Am. St. Rep. 521, 14 L. R. A. 700. So if one harbors a minor who has left home against the will of his parents. *Arnold v. St. Louis, &c., R. R. Co.*, 100 Mo. App. 470, 74 S. W. 5. "The criterion of the parents' right of action is not the will of the child, but the will of the parents; and it is immaterial that at the time

of the alleged wrongful act of the defendant the child was not actually a member of the parents' household, provided they had a right to recall her to their custody and service." *Hare v. Dean*, 90 Me. 308, 313, 38 Atl. 227. But knowledge in the defendant of the relation should be averred. *Butterfield v. Ashley*, 6 Cush. 249, and cases cited.

38—*Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341.

39—*Hoover v. Heim*, 7 Watts, 62; *Hammer v. Pierce*, 5 Harr. 171; *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633; *Whitney v. Hitchcock*, 4 Denio, 461; *Klingman v. Holmes*, 54 Mo. 304.

40—*Dominick Pipe Works v. Wood*, 139 Ala. 282, 35 So. 885; *Augusta Factory v. Davis*, 87 Ga. 648, 13 S. E. 577; *Louisville, &c., Ry. Co. v. Goody Koontz*, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; *Meers v. McDowell*, 110 Ky. 926, 62 S. W. 1013, 53 L. R. A. 789; *Cuming v. Brooklyn City R. R. Co.*, 109 N. Y. 95, 16 N. E. 65; *Forsythe v. Central Mfg. Co.*, 103 Tenn. 497, 53 S. W. 731; *Karr v. Parks*, 44 Cal. 46. It has been held in Indiana, that where one suffered a negligent injury in his own person, and by the same negligence his wife and child were injured, this was all, as to him, one cause of action. *Cincinnati, &c., R. R. Co. v. Chester*, 57 Ind. 297. If the father has consented that his son do the kind of work and at the place where injured,

in case of a female child, by seduction. In some of these cases there may be two wrongs: One to the parent, in depriving him of the child's services; and one to the child, to his personal injury.⁴¹ But the right of action in each, being distinct rights, cannot be joined.⁴² The right of action is in the father,⁴³ but in case of his desertion or death the mother may sue.⁴⁴ If the injury caused instant death there was no remedy at common law.⁴⁵

*Where the charge is that defendant has enticed the [*270] child away from the parent, his motive for his action is important, and may sometimes furnish him with justification. Whatever induces the child to leave the parent, or, after leaving, to remain away from him, may in law constitute enticement; but to receive and shelter a child from parental abuse, may sometimes be a moral duty, and therefore justifiable. In New Hampshire it has been said that if one give protection and shelter to a child, with a view or intent of enabling or encouraging him to keep away from his father, or with the knowledge that it aided or encouraged him to keep away, this would be wrongful and actionable conduct.⁴⁶ A similar rule has been laid down in Iowa, where one who had employed a runaway child, without knowledge

cannot recover. *Dominick Pipe Works v. Wood*, 139 Ala. 282, 35 So. 885.

41—*Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751; *Forsyth v. Central Mfg. Co.*, 103 Tenn. 497, 53 S. W. 731.

42—*Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483. The father may recover, notwithstanding the action in behalf of the child. *Evan-sich v. G. C. & Co., Ry. Co.*, 57 Tex. 123, 44 Am. Rep. 586; *Welton v. Middlesex, & Co.*, 125 Mass. 130. But he cannot recover for the child's suffering.

43—*Citizen's St. R. R. Co. v. Willoeby*, 15 Ind. App. 312, 43 N. E. 1058.

44—*Horgan v. Mills*, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504; *Kerr v. Pennsylvania R. R. Co.*, 169 Pa. St. 95, 32 Atl. 96.

45—*Bligh v Biddeford, & Co., R. R. Co.*, 94 Me. 499, 48 Atl. 112; *Ohnmacht v. Mount Morris Elec. Lt. Co.*, 66 App. Div. 482, 73 N. Y. S. 296; *Gulf, & Co., Ry. Co. v. Beall*, 91 Tex. 310, 42 S. W. 1054, 66 Am. St. Rep. 892, 41 L. R. A. 807. Not even when the son has contracted to contribute a certain sum monthly to his father's support. *Brink v. Wabash R. R. Co.*, 160 Mo. 87, 60 S. W. 1058, 83 Am. St. Rep. 459, 53 L. R. A. 811.

46—*Sargent v. Mathewson*, 38 N. H. 54.

of his misconduct, was held liable for retaining him in his service after notice that the father objected, but not before.⁴⁷

In Connecticut it was held, at an early day, that the father might sustain an action against one who enticed his minor daughter from his service, and procured her to be married to another person without his consent. The marriage, however, was averred to be fraudulent, and to have been procured in order to obtain the discharge of a relative of the defendant from a prosecution for bastardy; and it was also averred that the marriage had been annulled by the legislature for the fraud.⁴⁸ In Kentucky, where no fraud in the marriage was averred, it was decided that the action might be sustained for enticing the minor daughter from her mother's service and procuring her to be married, but that the recovery of damages must be restricted to the time which elapsed previous to the time when the marriage actually took place.⁴⁹ In Massachusetts it is denied with much good reason that any such action can be maintained—the girl being of the age of legal consent—even though by statute the conduct of the defendant would have been punishable as a crime.⁵⁰ The reason is tersely and clearly stated in the opinion: "The law of marriage entirely overrides the general principles of right of the parent to the services of the child, or the duties from [*271] one to the *other as servant and master, by allowing the female child to terminate it at any moment after she arrives at the age of twelve years, by uniting herself to some one in marriage. If the marriage of the daughter was a legal act, from the time of its consummation the daughter was legally discharged from all further duties to perform services for her parent, having assumed new relations inconsistent therewith."

Parent's Action for Seduction of Daughter. Where seduction of a daughter is the injury complained of, some of the anomalies of basing the right of recovery upon the loss of services are

47—*Everett v. Sherfey*, 1 Iowa, 356. See, to the same effect, *Butterfield v. Ashley*, 6 Cush. 249.

48—*Hills v. Hobert*, 2 Root, 48 (1793).

49—*Jones v. Tevis*, 4 Litt. 25 (1823), 14 Am. Dec. 98.

50—*Hervey v. Moseley*, 7 Gray, 479, 66 Am. Dec. 515. See, also, *Goodwin v. Thompson*, 2 Greene

deserving of special notice. A statement of the conclusions of the judicial mind under different sets of circumstances will show what these anomalies are.

First—The father suing for this injury in the case of a daughter actually at the time being a member of his household, is entitled to recover in his capacity of actual master for a loss of services consequent upon any diminished ability in the daughter to render services. That an actual loss is suffered under such circumstances the law will conclusively presume, and evidence that the daughter was accustomed to render no service will not be received. And while this supposed loss will constitute the nominal ground of recovery, a substantial award of damages will be supported, based on the injury to the parental feelings and the shame and mortification which must follow from such a wrong. To this also may be added any pecuniary expense which the parent has been put to for care, medical attendance, etc.⁵¹

Second—If the daughter at the time was not actually a member of the father's household, yet if she were not in the actual *service of another, and the father had a right to [*272] recall her to his own service, he may maintain the action

(Iowa), 329; *Holland v. Beard*, 59 Miss. 161, 42 Am. Rep. 360. *Birkhead*, 13 Ired. 28, 55 Am. Dec. 427; *Vossell v. Cole*, 10 Mo. 634, 47 Am. Dec. 136; *Emery v. Gowen*, 4 Me. 33, 16 Am. Dec. 233; *Mighell v. Stone*, 175 Ill. 261, 51 N. E. 906; *Mighell v. Stone*, 74 Ill. App. 129; *Stowers v. Singer*, 113 Ky. 584, 68 S. W. 637; *Beaudette v. Gague*, 87 Me. 534, 33 Atl. 23; *Middleton v. Nichols*, 62 N. J. L. 636, 43 Atl. 575; *Anderson v. Riggs*, 64 N. J. L. 407, 45 Atl. 782; *Ayer v. Colgrove*, 81 Hun, 323, 30 N. Y. S. 1129; *Scarlett v. Norwood*, 115 N. C. 284, 20 S. E. 459; *Ingwaldson v. Skrivseth*, 7 N. D. 388, 75 N. W. 772; *Milliken v. Long*, 188 Pa. St. 411, 41 Atl. 540. It makes no difference whether the debauching was by artifice or force. *Lawrence v. Spence*, 99 N.

51—*Bennett v. Allcott*, 2 T. R. 166; *Manvell v. Thomson*, 2 C. & P. 303; *Thompson v. Ross*, 5 H. & N. 16; *Harris v. Butler*, 2 M. & W. 539; *Blaymire v. Haley*, 6 M. & W. 55; *Hedges v. Tagg*, L. R. 7 Exch. 283; *Clarke v. Fitch*, 2 Wend. 459, 20 Am. Dec. 639; *Hewitt v. Prime*, 21 Wend. 79; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; *Knight v. Wilcox*, 14 N. Y. 413; *White v. Nellis*, 31 N. Y. 405, 88 Am. Dec. 282; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Kennedy v. Shea*, 110 Mass. 147, 14 Am. Rep. 584; *Howland v. Howland*, 114 Mass. 517; *Blanchard v. Ilsley*, 120 Mass. 487, 21 Am. Rep. 535; *McAulay v.*

the same as if she actually had been recalled or had returned.⁵²

Third—But if the daughter was actually in the service of another, no action could be maintained by the parent, because the conditions which support it did not then exist.⁵³ In such a case

Y. 669; *Lavery v. Crooke*, 52 Wis. 612, 38 Am. Rep. 768. The father's administrator may recover for a seduction. *Noice v. Brown*, 39 N. J. L. 569. If before any expense is incurred by the father the daughter marries he cannot recover. *Humble v. Shoemaker*, 70 Ia. 223. "This form of action is based upon the legal fiction of loss of service, and the relation of master and servant must exist. In the case of a minor daughter such relation is presumed to exist between her and her father, and no acts of service need be proved, unless he has divested himself of the right to control her person or to require her services. When the daughter is of age, it must appear that she resided in her father's family and performed some acts of service, however slight. * * * It is not necessary that the services of an adult daughter should be such as the father can command. * * It is sufficient if by mutual assent the relation of master and servant did in fact exist." *Beaudette v. Gague*, 87 Me. 534, 539, 540, 33 Atl. 23.

52—*Bolton v. Miller*, 6 Ind. 265; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; *Martin v. Payne*, 9 Johns. 387, 6 Am. Dec. 288; *Mulvehall v. Millward*, 11 N. Y. 343; *Hornketh v. Barr*, 8 Serg. & R. 36, 11 Am. Dec. 561; *Kennedy v. Shea*, 110 Mass. 147, 14 Am. Rep. 584; *Van Horne v. Freeman*, 6 N. J. 322; *Mercer v. Walmsley*,

5 H. & J. 27, 9 Am. Dec. 486; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Roberts v. Connelly*, 14 Ala. 239; *Blagge v. Ilsley*, 127 Mass. 191; *Ogborn v. Francis*, 44 N. J. L. 441, 43 Am. Rep. 394. In *Terry v. Hutchinson*, L. R. 3 Q. B. 599, it is held that the moment an actual service of the daughter with another is terminated, even though it be wrongfully, and she intends to return to her father, he has a right to her services, and may maintain the action. See *Ellington v. Ellington*, 47 Miss. 329; *Van Horn v. Freeman*, 6 N. J. 322. In *Blanchard v. Ilsley*, 120 Mass. 487, 21 Am. Rep. 535, the woman who was seduced resided at the time in the family of a married sister, without paying for her board, but with no agreement with her father or herself for any payment for services. *Held*, that the sister's husband could not sue, as master, for her seduction.

A stepfather cannot bring an action when the girl is at work for some one else, and he cannot control her services, even though she return to his house for confinement. *Kinney v. Laughenour*, 89 N. C. 365.

53—*Dean v. Peel*, 5 East, 49; *South v. Denniston*, 2 Watts, 474; *Nickleson v. Stryker*, 10 Johns. 115; *Dain v. Wycoff*, 7 N. Y. 191. The fact that the daughter went home once a week and then assisted her father and mother will

the person in whose employ she was for the time being might maintain the suit, unless he himself were the wrong-doer, in which case it could not be brought at *all.⁵⁴ To this [*273] last statement this exception is to be made: that if the defendant procured the woman to enter his service fraudulently and for the purpose of withdrawing her from her family and seducing her, this is a wrong which precludes his claiming any rights or protection as master, and the parent may support an action as if the hiring had never taken place.⁵⁵

This statement of the law is sufficient to show some of its absurdities, and to justify some recent statutory changes.

The time when the cause of action is deemed to have accrued may depend upon the form of action. This may be either in trespass or case. If the wrong-doer comes upon the premises of the plaintiff and accomplishes the seduction there, the wrongful act characterises his entry upon the land, and the seduction is to

not suffice, if father not entitled to the service. *Whitbourne v. Williams*, (1901) 2 K. B. 722. The father may sue if he retains right to command the services of the child though she be at the time in another's service. *Mohry v. Hoffman*, 86 Pa. St. 358; *Riddle v. McGinnis*, 22 W. Va. 253; *Lavery v. Crooke*, 52 Wis. 612, 38 Am. Rep. 768; *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52. The action being grounded on loss of service, the fact that the daughter is of full age is immaterial. *Keller v. Donnelly*, 5 Md. 211; *Greenwood v. Greenwood*, 28 Md. 370; *Vossel v. Cole*, 10 Mo. 634, 47 Am. Dec. 136; *Sutton v. Hoffman*, 32 N. J. 58; *Wert v. Strouse*, 38 N. J. 184; *Stevenson v. Belknap*, 6 Iowa 97, 71 Am. Dec. 392; *Lipe v. Eisenlerd*, 32 N. Y. 229; *Bennett v. Allcott*, 2 T. R. 166; *Harper v. Luffkin*, 7 B. & C. 387. In this last

case the daughter was married, but was living apart from her husband with her father. If the daughter is above the age of 21, she must be actually a member of the family or the parent cannot sue. *Clark v. Fitch*, 2 Wend. 459, 20 Am. Dec. 639; *McDaniel v. Edwards*, 7 Ired. 408, 47 Am. Dec. 331; *Lee v. Hodges*, 13 Gratt. 726; *Patterson v. Thompson*, 24 Ark. 55; *Kendrick v. McCrary*, 11 Ga. 603; *Sutton v. Hoffman*, 32 N. J. 58; *Wert v. Strouse*, 38 N. J. 184. If she does live at home it is immaterial that she gives her services voluntarily and pays board. *Lamb v. Taylor*, 8 Atl. Rep. 760 (Pa.).

54—See *Edmondson v. Machell*, 2 T. R. 4; *Bennett v. Allcott*, 2 T. R. 166; *Manvell v. Thomson*, 2 C. & P. 303.

55—*Speight v. Oliviera*, 2 Stark. 435; *Dain v. Wyckoff*, 18 N. Y. 45, 72 Am. Dec. 493.

be regarded as an aggravation of the trespass.⁵⁶ Trespass, therefore, can only be brought by the parent when the daughter resided with him at the time of the seduction. But if the daughter, after seduction abroad, returns to the home of her parents, where expenses are incurred and loss, actually or by presumption of law, suffered in consequence of the seduction, the right of action is deemed to arise from this expense or loss, but the action must be in case for the consequential injury. It is, therefore, sufficient that the actual or supposed relation of master and servant exist, either at the time of the seduction or at the time of the resulting damage; the form of the remedy being varied to meet the facts, but the substantial recovery being the same in each case.⁵⁷ In New York, however, this distinction is denied, and it is held that whether the form of action be trespass or case, the actual or supposed relation which supports the action must have existed at the time of the seduction.⁵⁸ That would certainly be true were the action brought by one who sustains only the conventional relation of master to the woman seduced: he cannot hire a disabled servant, and then claim the wrong which disabled her as an injury to himself; but where the parent sues, the real relation has existed from the first *—the right of control being only suspended while the daughter was in the service of another—and the law imposes upon the parent certain obligations in the support of his children from which he is not released by their misconduct. There is, consequently, a very obvious difference between a master hiring a disabled servant and a parent receiving back to his home a disabled child. In the former case the master assumes no consequences except as, in view of his own interest, he bargains to do so; but in the latter, the child must be taken as she is, and the cause of action may well be held to relate back to the time when the wrongful act was committed from which injurious consequences subsequently flow.⁶⁰

56—Hubbell v. Wheeler, 2 Aik. Ellington v. Ellington, 47 Miss. 359; Parker v. Meek, 3 Sneed, 29; 329; Sargent v. —, 5 Cow. 106. Logan v. Murray, 6 Serg. & R. 58—Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338.

57—Parker v. Meek, 3 Sneed, 29; 60—In Coon v. Moffit, 3 N. J.

It is not essential to the maintenance of the suit that pregnancy should have resulted;⁶¹ it is sufficient if the ability to perform services was in any degree impaired as a direct consequence of the defendant's conduct.⁶²

If the father is deceased, the mother may bring the action for this injury.⁶³ So if the father lives out of the state.⁶⁴

It has been said above that the damages in these cases are by no means measured by the loss of service and the incidental care and expenses. It has been well said in Pennsylvania that "proof of the relation of master and servant, and of the loss of service, by means of the wrongful act of the defendant, has relation only to the form of the remedy, and that the *action [*275] being sustained in point of form by the introduction of these technical elements, the damages may be given as a compensation to the plaintiff, not only for the loss of service, but also 'for all that the plaintiff can feel from the nature of the injury.'"⁶⁵ Similar expressions are to be met with in the decisions

583, 4 Am. Dec. 392, a mother was held entitled to sue for the seduction of her daughter, the seduction taking place before the father's death and the confinement afterward. The subject is carefully examined by PENNINGTON, J., in this case, who suggests that a master, where the service began after the seduction, might also recover for loss of service in confinement if his contract for the service antedated the seduction.

61—*Abrahams v. Kidney*, 104 Mass. 222, 6 Am. Rep. 220; *White v. Nellis*, 31 Barb. 279, or sexual disease. *Blagge v. Ilsley*, 127 Mass. 191.

62—See *Knight v. Wilcox*, 14 N. Y. 413; *Boyle v. Brandon*, 13 M. & W. 738. Compare *Eager v. Grimwood*, 1 Exch. 61.

63—*Coon v. Moffitt*, 3 N. J. 583, 4 Am. Dec. 392; *Sargent v. —*,

5 Cow. 106; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Gray v. Durland*, 51 N. Y. 424. *Felkner v. Scarlet*, 29 Ind. 154. It must appear that the mother was actually entitled to the child's services. *Hobson v. Fullerton*, 4 Ill. App. 280; *Ryan v. Fralick*, 50 Mich. 483.

Under the statutes of New York a wife who has been abandoned by her husband, and keeps a boarding-house on her own account, may sue in her own name for the seduction of her daughter, over 21 years of age, who lives with her and performs services for her. *Badgley v. Decker*, 44 Barb. 577.

64—*Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268.

65—*LEWIS, J.*, in *Phelin v. Kenderdine*, 20 Pa. St. 354, 361, quoting 2 Greenl. Ev. § 579.

of other courts.⁶⁶ When thus the substantial ground of recovery is found not to be the ground on which the action is nominally planted, we cannot refrain from uniting with the Supreme Court of Mississippi in expressions of regret that the law should be chargeable with such manifest absurdities, and in agreeing that "that system of jurisprudence which punishes in damages the slightest aggression upon property, but denies redress to the father, and if he be dead, to the mother, for the defilement of an infant daughter, except upon the predicate of a loss of services, is at variance with the sentiments and conscience of this age."⁶⁷ But the evil is not one to be corrected by judicial action; to uproot it would be to create new law, and this is the province of legislation. The Supreme Court of Kansas has disregarded the

66—See, particularly, *Lipe v. Eisenlerd*, 32 N. Y. 229, 236, per DENIO, Ch. J.; *Clark v. Fitch*, 2 Wend. 459, 20 Am. Dec. 639; *Stiles v. Tilford*, 10 Wend. 338; *Pruitt v. Cox*, 21 Ind. 15; *Felkner v. Scarlet*, 29 Ind. 154; *Taylor v. Shelkett*, 66 Ind. 297; *Phillips v. Hoyle*, 4 Gray, 568; *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Kendrick v. McCrary*, 11 Ga. 603; *Ellington v. Ellington*, 47 Miss. 329; *Lunt v. Philbrick*, 59 N. H. 59; *Morgan v. Ross*, 74 Mo. 318; *Rollins v. Chalmers*, 51 Vt. 592; *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52; *Mighell v. Stone*, 175 Ill. 261, 51 N. E. 906; *Mighell v. Stone*, 74 Ill. App. 129; *Cook v. Bartlett*, 179 Mass. 576, 61 N. E. 266; *Middleton v. Nichols*, 62 N. J. L. 636, 43 Atl. 575; *Milliken v. Long* 188 Pa. St. 411, 41 Atl. 540. So in an action for enticing away a child, the parent may recover for his mental suffering. *Stowe v. Heywood*, 7 Allen, 118; *Magee v. Holland*, 27 N. J.

86, 72 Am. Dec. 341. In the case of injuries to the child, for which he would have an action in his own behalf, the recovery of the parent must be restricted to the actual pecuniary loss. *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633; *Whitney v. Hitchcock*, 4 Denio, 461; *Karr v. Parks*, 44 Cal. 46; *Sykes v. Lawlor*, 49 Cal. 236; *Boyd v. Blaisdell*, 15 Ind. 73; *Donahoe v. Richards*, 38 Me. 376, 61 Am. Dec. 256; *Rooney v. Milw. Chair Co.*, 65 Wis. 397; *Dunn v. Cass Ave. Ry. Co.*, 21 Mo. App. 188; *Durkee v. Centr. Pac. R. R. Co.*, 56 Cal. 388, 38 Am. Rep. 59. He may recover for loss of service, care of child, and expense resulting from injury, for a period not extending beyond the child's majority. *Frick v. St. Louis & Co.*, 75 Mo. 542. Previous unchastity may be shown in mitigation of damages. *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52; *Stowers v. Singer*, 113 Ky. 584, 68 S. W. 637.

67—*Ellington v. Ellington*, 47 Miss. 329, 351.

fiction and held that in that State "a parent may maintain an action for the seduction of the daughter without averment or proof of services or expenses of sickness."⁶⁸ Many States now have statutes which allow suits for seduction to be brought for the benefit of the woman herself, some near relative, or a guardian being suffered to bring it, and all allegations of loss of service being dispensed with.⁶⁹

68—*Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529, 72 Am. St. Rep. 360, 44 L. R. A. 757.

69—See *Updegraff v. Bennett*, 8 Iowa, 72; *Felkner v. Scarlet*, 29 Ind. 154; *Simons v. Busby*, 119 Ind. 13, 21 N. E. 451; *McCoy v. Trucks*, 121 Ind. 292, 23 N. E. 93; *Hawn v. Banghart*, 76 Ia. 683, 39 N. W. 251, 14 Am. St. Rep. 261; *Baird v. Bohner*, 77 Ia. 622, 42 N. W. 454; *Egan v. Murray*, 80 Ia. 180, 45 N. W. 563; *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696; *Rabeke v. Baer*, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567. As to the effect of giving a statutory remedy upon the common law right, see *Cross v. Goodman*, 20 Up. Can., Q. B. 242; *Watson v. Watson*, 49 Mich. 540; *Weiher v. Meyersham*, 50 Mich. 602. There must be some false promise. Intercourse is not enough to make seduction where woman sues herself. *Baird v. Boehner*, 77 Ia. 622, 32 N. W. 694. "The word 'seduction,' when applied to the conduct of a man towards a woman, means the use of some influence, artifice, promise or means on his part, by which he induces the woman, who is then, and has theretofore for a reasonable time been, a woman of chaste conduct, to submit to unlawful intercourse with him." *Stowers v. Singer*, 113 Ky. 584, 68

S. W. 637. To same effect. *Hawn v. Banghart*, 76 Ia. 683, 39 N. W. 251, 14 Am. St. Rep. 261; *Egan v. Murray*, 80 Ia. 180, 45 N. W. 563; *Rabeke v. Baer*, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567; *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272; *Bradshaw v. Jones*, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655. Where a statute gives a woman a right of action for her seduction, she cannot recover if she is equally guilty with the man. *Breon v. Henkle*, 14 Ore. 494. When the seduced woman may sue in her own name, she may bring an action after as well as before a marriage to a third person. *Dowling v. Crapo*, 65 Ind. 209. When a woman marries her seducer and is then divorced, she cannot afterwards sue for the seduction. *Henneger v. Lomas*, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848. But she may if the marriage is annulled. *Ibid.* In *Gunder v. Tibbits*, 153 Ind. 591, 55 N. E. 762, a joint suit was sustained against the seducer and a physician whom he employed to procure abortions on the plaintiff, and the seduction, different acts of sexual intercourse and several abortions extending over a period of several years were held to constitute a single wrong. And see *Gemmell v. Brown*, 25 Ind.

[*276] *Wherever this action is permitted at the common law, it is assumed that the plaintiff is not in fault. If he was assenting to the seduction, or connived at it, or without objection permitted such improper action on the part of the defendant as might naturally, and in fact did, lead to it, these facts may be pleaded in bar of a recovery.⁷⁰

Adopted Children. A conspicuous feature of some of the systems of law is the facility with which they permit the formation of family relations with which ties of blood have no necessary connection. This is accompanied by some formal act of adoption, and the child adopted comes into the family with all the rights of a child by birth, and subject to all the same duties and obligations. It has been said on a preceding page⁷¹ that the common law knows nothing of an adoption with such consequences. Nevertheless, if one is received into the family by adoption, the remedies in respect to third persons will be the same, while the relation exists, that they would be in the case of a child by nature.⁷²

Wrongs to a Child. For an injury suffered by the child in that relation no action will lie at the common law. The obligation of the parent to support him is only enforced by proceedings on behalf of the public, and not by suit in the name of or on behalf of the child. And no action will lie against a third person for depriving a child of his source of support by means of an injury to the parent. By statute, however, a remedy [*277] is given in a few cases which will be considered further on. Where the child is injured in his own property or person, redress has no necessary connection with the family

App. 6, 56 N. E. 691. A woman cannot sue for her own seduction in the absence of statute. *Conlon v. Cassidy*, 17 R. I. 518, 23 Atl. 100. 70—*Reddie v. Scoolt*, 1 Peake. A woman a statutory action is allowed to be brought for the woman's benefit, the conduct of the nominal plaintiff, it would seem, should not prejudice her recovery.

316; *Seager v. Sligerland*, 2 71—*Ante*, p. *43.
Caines, 219; *Smith v. Mastin*, 15 72—Suit lies for seduction of adopted daughter. *Cook v. Bartlett*, 179 Mass. 576, 61 N. E. 266.

relation. A minor child has no civil remedy against its parents, or either of them, for cruel and abusive treatment.⁷³

Actions by Guardians. The guardian is either of the ward's person, or of his estate, or of both. The guardian of the estate may maintain all proper suits for its protection. The guardian of the ward's person may, in general, maintain suits for personal injuries to the ward when, under corresponding circumstances, the parent might maintain them.⁷⁴ It has been held that he may bring suit for the seduction of his female ward, the right being grounded on the legal control he has over the minor's services.⁷⁵ But the contrary has been held in Massachusetts, where he has no such control.⁷⁶

Action for Loss of Marriage. The first of family rights is that of forming the relation of marriage, observing for the purpose such rules as have been prescribed by statute as pre-requisites. The first of these, and in nearly all the States the only indispensable one is that of competent consent. If, after consent once given, one of the parties refuses performance, this, in law, is a mere breach of contract, except where, by means of the contract of marriage, the man has been enabled to accomplish the woman's seduction. The case then becomes a gross fraud, and may be prosecuted as a tort.⁷⁷ There is something in it more than a fail-

73—*McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664, 102 Am. St. Rep. 787; *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788, 107 Am. St. Rep. 708; *Hewlett v. Ragsdale*, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682. In the last case the court says: "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the

hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand." p. 711. See *ante*, pp. 294, 299.

74—*Louisville, &c., Ry. Co. v. Goody-Koontz*, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371.

75—*Fernsler v. Moyer*, 3 W. & S. 416.

76—*Blanchard v. Ilsley*, 120 Mass. 487, 21 Am. Rep. 535.

77—See the subject referred to in the chapter on Frauds in Confidential Relations.

ure to keep an agreement: there is failure to atone for a great wrong accomplished by means of a confidential relation.

The prevention of a marriage by the interference of a third person, cannot, in general, in itself, be a legal wrong. Thus if one, by solicitations, or by the arts of ridicule or otherwise, shall induce one to break off an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct. But a loss of marriage may be such a special injury as will support an action of slander or libel, where the party was induced to break off the engagement by false and damaging charges not actionable *per se*.⁷⁸ Here the action, it [*278] is perceived, is for the defamation, and the *loss of the marriage only the damage flowing from the injury. A contemplated marriage might be prevented by the forcible separation of the parties, or by the imprisonment of one of them; but the wrong in contemplation of law, would consist in the assault, or in the false imprisonment, and not in the loss of marriage. The suit might, therefore lie in favor of one party, and not in favor of the other, if only one was subjected to the illegal force.

It has been held, however, that if one, by the false and malicious assertion to the intended husband that the woman is already his own wife, succeeds in breaking up an intended marriage, the woman may have an action against him for this fraud.⁷⁹

As the age of consent to marriage is usually below the age of full capacity to act on the child's own behalf, there may in some cases be an apparent conflict of rights in respect to forming the relation of marriage. Previous to the child's legal emancipation, the parent is entitled to control his actions, and may rightfully withhold consent from a contemplated marriage, and break it up. But on the other hand, the child, if over the age of consent, may enter into the relation of marriage if he can succeed

78—Davis v. Gardiner, 4 Coke, 351; Harriott v. Plimpton, 166 16; Parkins v. Scott, 1 H. & C. Mass. 585, 44 N. E. 992.
 Cas. 153; Nelson v. Staff, Cro. Jac. 79—Shepherd v. Wakeman, 1 422; Southold v. Daunston, Cro. Sid. 79.
 Car. 269; Moody v. Baker, 5 Cow.

in doing so, and the relation will be perfectly legal and valid. Here is an apparent conflict of rights; but a real conflict of rights can never exist; for what one has a lawful right to do, another cannot have a lawful right to prevent. The solution of the apparent difficulty is to be found in this: The minor child has not, in strictness of law, when he reaches the age of consent, a *right* to form the relation of marriage, but only the *capacity* to do so. The age of consent is merely the age fixed by the law, below which a marriage is voidable. The marriage of a minor above that age, though in strictness of law it should not be formed without parental consent, is nevertheless sustained on grounds of public policy; and parental rights are made to yield to it. The parent may prevent the marriage if he can, but, failing in this, his rights are incidentally abridged by the marriage, as they would be if consent were given. The marriage displaces parental rights instead of creating a conflict.⁸⁰

***Fraudulent Marriage.** A very serious wrong may be [*279] accomplished by inducing one, through misrepresentation and fraud, to enter into an illegal marriage. It was decided in an early case, that where a married man, by falsely assuming to be single, succeeded in inducing a woman to marry him, she might, on discovering the deception, maintain an action against him for the injury.⁸¹ This doctrine has been applied in New York to the case of one from whom his wife had procured a decree of divorce, leaving him incapacitated to marry again during her life time.⁸² The tort in such a case consists in the fraud

80—See *Hervey v. Moseley*, 7 Gray, 479, 66 Am. Dec. 515. A father has no claim to the services of a minor daughter after her marriage when that takes place after the age of consent. Such marriage is valid though against parental wishes. *Aldrich v. Bennett*, 63 N. H. 415, 56 Am. Rep. 529; *Holland v. Beard*, 59 Miss. 161. If a girl is married shortly before reaching the age of consent, and continues to cohabit after reaching such age, the mar-

riage is valid and want of consent of her parents is immaterial. *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791.

81—Anonymous, *Skinner*, 119. And so in the following: *Cocke v. Greene*, 180 Mass. 525, 62 N. E. 1053; *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; *Payne's Appeal*, 65 Conn. 397, 32 Atl. 948, 48 Am. St. Rep. 215, 33 L. R. A. 418.

82—*Blossom v. Barrett*, 37 N. Y. 434. A similar action was

accomplished, to the woman's serious, and perhaps permanent, injury. Nor can it be essential that any false affirmations should have been made in words. The woman to whom marriage is offered by one she does not know to be married is not bound, at her peril, to suspect him of intended crime, and to question him accordingly; but she may rightfully assume, as she commonly will, that he has lawful authority to do what he proposes, and his conduct in proposing is of itself a false affirmation if he has not.⁸³

brought in Maine, after the man's death, against his personal representative, and sustained. *Withee v. Brooks*, 65 Me. 14. In Pennsylvania, however, it was held the right of action did not survive. *Grim v. Carr's Admr.*, 31 Pa. St. 533. In *Higgins v. Breen*, 9 Mo. 497, a woman who had been united in a void marriage with a married man, whom she believed to be single, was held entitled, after his death, to recover against his estate the value of her services. In *Payne's Appeal*, 65 Conn. 397, 32 Atl. 948, 48 Am. St. Rep. 215, 33 L. R. A. 418, where a man was fraudulently induced to marry a woman who already had a husband and lived with her until her death, it was held he could not recover for her support from her estate. The court says: "The deception by which a married woman induces a man to falsely assume and maintain the status of her husband, is an injury to the person complete with the consummation of the void marriage. Such an injury gives to the man a right of action against the woman for damages resulting from such false assumption of the status of husband. A pecuniary loss sustained by having in fact lived with a

woman in the relation of husband and wife may be considered in estimating the damages caused by this injury; but such loss, if it can be recovered at all separate from all other damage, can only be recovered in an action based on the original wrong, in which the plaintiff abandons all claim to any resulting damage except this incidental loss; and therefore the substantial cause of the only action in which such loss can be separately recovered, is the deception by which the plaintiff was induced to falsely assume the legal status of a husband. Such cause of action is founded wholly on a private wrong, and under existing law cannot survive against the legal representatives of the perpetrator." p. 406.

83—G., a woman, was secretly married to Dr. C. and the marriage was kept a secret for fear her father would cut off an allowance, if he knew of the fact. G. lived with the doctor under the guise of his housekeeper and assistant and went by the name of Mrs. G. She was introduced to the plaintiff, a lady patient of the doctor's, as Mrs. G. Later she left the doctor and the plaintiff was married to him. Upon discover-

Known impotency on the part of the man, it would seem, must be a fraud on the marriage; and being with child by another man at the time of the marriage, and not disclosing the fact, would be a like fraud in the woman. For these the marriage might be annulled by a competent court,⁸⁴ but they afford no ground for an action at the common law. But in such a case an action for damages will lie against a third party who is a party to the fraud. Thus K. was a domestic in the employ of the defendant G. and became pregnant by him. K. and G. then conspired to bring about her marriage to the plaintiff by representing to him that K. was virtuous and respectable. Upon discovering the fraud the plaintiff sued K. and G. jointly and recovered a judgment for \$2,000 against G., apparently no judgment being asked or taken against K. In affirming the judgment the court says: "By the fraudulent conduct of the defendant, he was not only compelled to expend money to support a woman whom he would not otherwise have married, but was also deprived of her services while she was in childbed. He thus sustained actual damages to some extent, and as the wrong involved not only malice but moral turpitude also, in accordance with the analogies of the law on the subject, the jury had the right to make the damages exemplary. By thus applying well-settled principles upon which somewhat similar actions are

ing the fraud the plaintiff sued both the doctor and G. jointly. It was held that G. was not liable, that the failure of G. to tell the plaintiff of the true state of affairs was not a legal fraud. *Cocke v. Greene*, 180 Mass. 525, 62 N. E. 1053.

84—*Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 67 N. E. 63, 95 Am. St. Rep. 609; *Scott v. Shufeldt*, 5 Paige, 43; *Reynolds v. Reynolds*, 3 Allen, 605; *Donovan v. Donovan*, 9 Allen, 140; *Morris v. Morris*, Wright, (O.) 630; *Ritter v. Ritter*, 5 Blackf. 81. Ante-nuptial incontinence in the woman is no

ground whatever for annulling a marriage. *Leavitt v. Leavitt*, 13 Mich. 452; *Varney v. Varney*, 52 Wis. 120, 38 Am. Rep. 726. Where one of the parties to a marriage contract is insane the marriage is void and may be annulled. *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256; *Pyott v. Pyott*, 191 Ill. 280, 61 N. E. 88. So a marriage will be annulled if the husband falsely represents that he is free from venereal disease. *Crane v. Crane*, 62 N. J. Eq. 21, 49 Atl. 734; *Svenson v. Svenson*, 178 N. Y. 54, 70 N. E. 120.

formed, this action can be sustained, because there was a wrongful action in the fraud, that was followed by lawful damages in the loss of money and services. * * * We think, however, that the action can be maintained upon a broader and more satisfactory ground, and that is the loss of *consortium*, or the right of the husband to the conjugal fellowship and society of his wife. The loss of consortium through the misconduct of a third person has long been held an actionable injury, without proof of any pecuniary loss. * * * The damages are caused by the wrongful deprivation of that to which the husband or wife is entitled by virtue of the marriage contract. They rest upon the loss of a right which the marriage relation gives and of which it is an essential feature. Whether that right is wrongfully taken away after it is acquired, or the person entitled to it is wrongfully prevented from acquiring it does not change the effect or lessen the injury.’⁸⁵

A marriage may be void because made in reliance upon [*280] *a fraudulent divorce. Fraudulent divorces are sometimes procured by going into foreign jurisdictions for the purpose, where neither courts nor legislature can have authority to grant them, because of the absence of the jurisdictional fact of residence. Where a marriage is entered into, in reliance upon such a divorce, with one not aware of the facts, the wrongs committed are precisely the same as if no such divorce had ever been obtained. They do not, therefore, require further notice here. The first marriage, under such circumstances, of course remains unaffected by the second, except as the latter constitutes a wrong which may justify a divorce. It does not discharge the guilty party from any of the duties or obligations imposed upon him by the first and legal marriage.

Burial Rights, and Rights in Dead Bodies. In respect to the burial of the dead, if anywhere, shall we find in the common law a recognition of legal rights in the family as an aggregate of persons. Even in that case, however, the recognition is very faint and uncertain. An unlawful interference with the buried dead

85—Kujek v. Goldman, 150 N. Am. St. Rep. 670, 34 L. R. A. 156. Y. 176, 179, 180, 44 N. E. 773, 55

of the family might probably be restrained by injunction on their joint application,⁸⁶ and the owner of the lot in which the body was deposited might maintain trespass *quare clausum* for its *disinterment, and recover substantial damages, [*281] in awarding which, the injury to the feelings would be taken into consideration.⁸⁷ "The holder of a lot in a cemetery

86—See Kincaid's Appeal, 66 Pa. St. 411, where burial rights are considered, and cases referred to. It is decided in this case that the grant of a burial lot in a cemetery, though purporting to be in fee, is only for so long as the ground is used for cemetery purposes, and that, under competent legislation, the cemetery may be vacated, and the bodies removed to other grounds without the consent of the family. Citing *Windt v. German Reformed Church*, 4 Sandf. Ch. 471; *Richards v. N. W. Prot. Dutch Church*, 32 Barb. 42; *Price v. Meth. Ep. Church*, 4 Ohio, 515; *Brick Presb. Church v. New York*, 5 Cow. 538; *Coates v. New York*, 7 Cow. 585; *City Council v. Wentworth Baptist Church*, 4 Strob. 306. Approving the Pennsylvania case, see *Partridge v. First Independent Church*, 39 Md. 631. Where the use of cemetery grounds for that purpose is discontinued, the lot owner has a right to remove monuments as personalty. *Ibid.* After the lot owner has for twenty years cared for his lot, the cemetery association cannot prohibit his doing it and do the work itself. *Silverwood v. Latrobe*, 68 Md. 620, 13 Atl. 161. The right of the owner of a cemetery lot much resembles that of the owner of a pew in a church. This last right is gone if the church is destroyed by fire

or by time. *Freleigh v. Platt*, 5 Cow. 494; *Gay v. Baker*, 17 Mass. 435; *Howard v. First Parish, &c.*, 7 Pick. 137. And the owner has no right to compensation from the parish if use of the church is abandoned. *Fassett v. First Parish, etc.*, 19 Pick. 361. Neither has he if it is torn down because it has become unfit for use. *Gorton v. Hadsell*, 9 Cush. 508. See *Van Houton v. Reformed Dutch Church*, 17 N. J. Eq. 126. But if it is destroyed maliciously, or merely for the convenience of the parish, indemnity is due. *Gay v. Baker*, 17 Mass. 435; *Voorhees v. Presbyterian Church*, 8 Barb. 135; *S. C.* 17 Barb. 103; *Kellogg v. Dickinson*, 18 Vt. 266; *Cooper v. Presbyterian Church*, 32 Barb. 222; *In re Presbyterian Church*, 3 Edw. Ch. 155; *Gorton v. Hadsell*, 9 Cush. 508. A church member whose relatives are buried in a churchyard cannot from that fact deny the validity of an act allowing the church to raise the bodies in the yard on the ground that it violates the obligation of any contract. *Craig v. First Presb. Church*, 88 Pa. St. 42, 32 Am. Rep. 417.

87—*Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Besemer Land & Imp. Co. v. Jenkins*, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; *Gowen v. Bessey*, 94 Me. 114, 46 Atl. 792; *Pulsifer v. Doug-*

belonging to a municipality or religious society for burial purposes, whether his evidence of title be by deed, or certificate, or other means, does not acquire an absolute title to the land, but has the right, or license, exclusively of any and every other person, to bury the dead upon the subdivided plot assigned to him, and a license once acquired cannot be revoked so long as the ground continues to be used as a place of sepulchre."⁸⁸ The right is subject to the rules governing the cemetery when the lot was bought, and, if the privilege is limited to Catholics, one not a Catholic cannot be buried there.⁸⁹ And where the use of the ground for cemetery purposes is discontinued and the bodies are to be removed, the owners of lots, or of rights of burial therein, are held to be entitled to notice, if it is practicable to give it, and an opportunity to remove their own dead.⁹⁰ The rights in burial lots descend to heirs.⁹¹

As to rights in dead bodies, the state of the law and its evolution are thus stated by the Supreme Court of Minnesota: "Upon the questions, who has the right to the custody of a dead body for the purpose of burial, and what remedies such person has to protect that right, the English common law authorities are not very helpful or particularly in point, for the reason that from a very early date in that country the ecclesiastical courts assumed exclusive jurisdiction of such matters. It is easy to see, therefore, why the common law, in its early stages, refused to recognize the idea of property in a corpse, and treated it as be-

lass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238. At the common law, the only remedy for the wrongful removal of the body buried in church grounds was by indictment. *Regina v. Sharpe*, Dears. & B. 160; S. C. 40 Eng. L. & Eq. 581. A mortgagor of a cemetery lot may restrain the mortgagee from interfering with the bodies interred therein. *Thompson v. Hickey*, 8 Abb. N. C. 159.

88—*Gowen v. Bessey*, 94 Me. 114, 46 Atl. 792.

89—*Dwenger v. Gray*, 113 Ind. 106, 14 N. E. 903.

90—*Bessemer Land & Imp. Co. v. Jenkins*, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26.

91—*McWhirten v. Newell*, 200 Ill. 583, 66 N. E. 345; *Hook v. Joyce*, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96. See further as to rights in burial lots, *Donnelly v. Boston Catholic Cem. Assn.*, 146 Mass. 163, 15 N. E. 505; *Gardner v. Swan Point Cemetery*, 20 R. L. 646, 40 Atl. 871, 78 Am. St. Rep. 897.

longing to no one, unless it was the church. The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead, and of the living in their dead. Inclined to follow the precedents of the English common law, these courts were at first slow to realize the changed condition of things, and the consequent necessity that they should take cognizance of these matters and administer remedies as in other analogous cases. This has been accomplished by a process of gradual development, and all the courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and protect. The general, if not universal, doctrine is that this right belongs to the surviving husband or wife, or to the next of kin; and, while there are few direct authorities upon the subject, yet we think that the general tendency of the courts is to hold that, in the absence of any testamentary disposition, the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin."⁹² In this case it was held that the wife might recover damages for the unauthorized dissection of the husband's body.⁹³ So may a father recover for an unauthorized autopsy upon the body of his child.⁹⁴ And a son for the mutilation of the father's body,

92—*Larson v. Chase*, 47 Minn. 307, 308, 309, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85. The supreme court of Pennsylvania says: "It is commonly said, being repeated from the early cases in England where the whole matter of burials was under the jurisdiction of the ecclesiastical courts, that there can be no property in a corpse. But inasmuch as there is a legally recognized right of custody, control and disposition, the essential attribute of ownership, I apprehend that it would be more accurate to say

that the law recognizes property in a corpse, but property subject to a trust and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise. Whether, however, the rights be called property or not is manifestly a question of words rather than of substance." *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 56 Atl. 878, 99 Am. St. Rep. 795.

93—So also in *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. S. 471.

94—*Burney v. Children's Hospital*, 169 Mass. 57, 47 N. E. 401, 61

when the wife does not survive.^{94a} But an autopsy may be ordered by the coroner in a proper case, and in that event neither he nor those performing it, or otherwise concerned in it, will incur any liability.⁹⁵ In Indiana it has been said that "the bodies of the dead belong to the surviving relations, as property, and that they have a right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated."^{95a} But the common law recognized no such property, though it did recognize a property in the shroud or other apparel of the dead as belonging to the person who was at the charge of the funeral.^{95b}

Painful questions, which have never been passed upon by the courts, might arise, if a dispute should spring up among the relatives of the dead concerning the place where the body should be deposited. It has been decided, in an opinion of much research, that when the body has once been interred in a particular cemetery, without objection, the widow may be enjoined from removing it on the application of the heir, and the reasoning of the court would apply equally if the position of the parties were reversed.^{95c} But in Pennsylvania it is held that the wid-

Am. St. Rep. 273, 38 L. R. A. 413.

94a—*Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40.

95—*Young v. College of Physicians & Surgeons*, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540.

95a—*Bogert v. Indianapolis*, 13 Ind. 134, 138, per PERKINS, J. In New York it has been held that a person in charge of a corpse holds it as a trust for all interested in it from family ties or friendship, and that equity will make such disposition as seems just under all the circumstances, and in a contest before burial between the child of a first wife and a second wife, the wish of the child was followed. *Snyder v. Snyder*, 60 How. Pr. 368.

95b—2 Bl. Com. 429; *Matter of Brick Presb. Church*, 3 Edw. Ch. 155, 168; *Meagher v. Driscoll*, 99 Mass. 281, 284; *Pierce v. Proprietors, &c.*, 10 R. I. 227, 242.

95c—*Pierce v. Proprietors, &c.*, 10 R. I. 227, 14 Am. Rep. 667. See *Guthrie v. Weaver*, 1 Mo. App. 136. In this case it was decided that the husband who had buried his wife in her father's cemetery lot, and who desired to remove it, and was prohibited, could not maintain replevin for the coffin and its contents against the father, the body not being property, and the coffin ceasing to be merchandise when buried.

ow's control of the body ceases with the burial, and [*282] that thereafter its disposition belongs to the next of kin.^{95d}

The modern law in regard to the right of burial, removal and re-interment of dead bodies is very comprehensively summed up by the Supreme Court of Pennsylvania, as follows: "The result of a full examination of the subject is that there is no universal rule applicable alike to all cases, but each must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent and the rights and feelings of those entitled to be heard by reason of relationship or association.

"Subject to this general result it may be laid down first, that the paramount right is in the surviving husband or widow, and if the parties were living in the normal relations of marriage it will require a very strong case to justify a court in interfering with the wish of the survivor.⁹⁶

"Secondly, if there be no surviving husband or wife, the right is in the next of kin in the order of their relation to the decedent, as children of proper age, parents, brothers and sisters, or more distant kin, modified it may be by circumstances of special intimacy or association with the decedent.⁹⁷

95d—*Wynkoop v. Wynkoop*, 42 Pa. St. 293, 302, 82 Am. Dec. 506. Equity will restrain interference with a husband in removing his wife's body to another burial place if he has not freely consented to its interment where it is. *Wild v. Walker*, 130 Mass. 422.

96—To same effect. *Neighbors v. Neighbors*, 112 Ky. 161, 65 S. W. 607; *Pulsifer v. Douglass*, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85; *McEntee v. Bonacum*, 66 Neb. 651, 92 N. W. 633, 60 L. R. A. 440; *Foley v. Phelps*, 1 App.

Div. 551, 37 N. Y. S. 471; *Matter of Richardson*, 29 Misc. 367, 60 N. Y. S. 539; *Smiley v. Bartlett*, 6 Ohio C. C. 234. See as to right to custody of man's dead body as between a Catholic stepmother and a protestant son. *Butler v. Butler*, 91 App. Div. 327, 86 N. Y. S. 586.

97—Ibid. In the case quoted from it is further said: "In the absence of a surviving husband or widow the wishes of the next of kin are entitled to be considered with varying weight according to the nearness of the kinship and the personal relations between them and the decedent. A more

"Thirdly, how far the desires of a decedent should prevail against those of a surviving husband or wife is an open question, but as against remoter connections, such wishes, if strongly and recently expressed, should usually prevail."⁹⁸

"Fourthly, with regard to a reinterment in a different place, the same rules should apply, but with a presumption against removal growing stronger with the remoteness of connection with the decedent, and reserving always the right of the court to require reasonable cause to be shown for it."⁹⁹

For an injury to a monument an action of trespass may be brought by the owner of the burial lot; or, if there was no private ownership in the lot, then by the party erecting it.¹ Where a father was buried in the lot of his daughter in accord-

distant relative or even a friend not connected by ties of blood may have a superior right under exceptional circumstances to one nearer of kin." *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 317, 318, 56 Atl. 878, 99 Am. St. Rep. 795, 64 L. R. A. 179. If the next of kin disagree as to where the place of burial shall be, the duty devolves upon the court, in the exercise of its best judgment, to determine what, under all the circumstances, is the proper course to pursue. *Smiley v. Bartlett*, 6 Ohio C. C. 234.

98—The wishes of the deceased held not necessarily controlling. *McEntee v. Bonacum*, 66 Neb. 651, 92 N. W. 633, 60 L. R. A. 440; *Smiley v. Bartlett*, 6 Ohio C. C. 234.

99—*Pettigrew v. Pettigrew*, 207 Pa. St. 313, 56 Atl. 878, 99 Am. St. Rep. 795, 64 L. R. A. 179. In this case a removal of the husband's body was allowed at the instance of the widow as against the brothers and sisters of the deceased,

who were his next of kin. The following also involve the right of removal and support the last point quoted from the Pennsylvania case. *Thompson v. Deeds*, 93 Ia. 228, 61 N. W. 842, 35 L. R. A. 56; *Neighbors v. Neighbors*, 112 Ky. 161, 65 S. W. 607; *McEntee v. Bonacum*, 66 Neb. 651, 92 N. W. 633, 60 L. R. A. 440; *Smiley v. Bartlett*, 6 Ohio C. C. 234. Where the wife's body was buried in the lot of another with the latter's consent it was held that the husband could not remove the body without the owner's consent but, if it was understood at the time of burial that the interment was to be temporary, he would only be liable for actual damages to the lot in case of removal without consent. *Pulsifer v. Douglass*, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238.

1—*Spooner v. Brewster*, 3 Bing. 136; *Partridge v. First Independent Church*, 39 Md. 631; *Hook v. Joyce*, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96.

ance with his wish, it was held that his widow, a step-mother of the daughter, had a right to erect a monument on the lot to her husband, and it was also held that all the kin of the deceased were entitled to put flowers on the grave in such way as not to interfere with each other.²

Exemption Laws. One of the most distinct instances of recognitions of the family, as such, for the purposes of legal remedy, is to be found in the constitutional and statutory provisions exempting property from levy and sale on legal process for the satisfaction of debts. These exemptions are, for the most part, made for the benefit of the family, and to householders only. The provisions are so different in different states that it would be idle to attempt, in any such space as is at our command, to make an abridged statement of the law. In many States the husband can only dispose of an interest in exempt property with his wife's consent, and if he fails to resort to the proper legal remedies for the protection of the exemption, the wife may bring suits for the purpose.³

The benefit of the homestead is, in many of the States, continued to the family after the owner's death, so long as they, as a family, occupy it.⁴ For a wrongful levy and sale of exempt property an action will lie.⁵

Master and Servant. The wrongs which the master may sustain in that relation at the hands of others are substantially confined to being deprived of services. Connected with this, however, may be incidental damages, such as expenses in care and attention for the servant, medicines, etc., when the loss is occasioned by some violence to the servant, or injury to his health, so that his care devolves upon the master, and perhaps

2—*Thompson v. Deeds*, 93 Ia. 228, 61 N. W. 842, 35 L. R. A. 56. 55 Ark. 101, 17 S. W. 593; *Cronfeldt v. Arrol*, 50 Minn. 327, 52 N.

3—See cases collected in *Smyth on Homesteads and Exemptions*, §§ 456, and 521. W. 857, 36 Am. St. Rep. 648; *Hamilton v. Fleming*, 26 Neb. 240, 41 N. W. 1002; *Smith v. Johnson*, 43

4—*Smyth on Homesteads and Exemptions*, Ch. XI. Neb. 754, 62 N. W. 217; *Jones v. Alsbrook*, 115 N. C. 46, 20 S. E.

5—*Boggan v. Bennett*, 102 Ala. 400, 14 So. 742; *Thompson v. Ogle*, 170.

[*283] other *incidental expenses in some cases. The principles which govern the recovery have been sufficiently indicated in speaking of parent and child.⁶ The wrongs which a servant might suffer at the hands of third persons would be redressed, independent of the relation.

INJURIES BY THE USE OF INTOXICATING LIQUORS.

Within the last few years statutes have been passed in a number of the States giving to husband, wife, parent, child, or guardian, and sometimes to other parties, for injuries done by intoxicated persons, the right to maintain actions against the person or persons who may have sold or given the liquors which caused the intoxication. Also for injuries to means of support; for the expense and trouble of caring for the intoxicated person; and for other injuries and losses which are particularly pointed out in the statutes, which are here copied. All these provisions are for the benefit and protection of the family, and are therefore here presented; but it has been deemed better to give them in detail, than to attempt to bring together their several provisions under one head.⁷

Arkansas. An act applying to Washington county only provides that "every husband, wife, parent, guardian, or other person, who shall be injured in person or property, or means of support by any intoxicated person, or in consequence of the intoxication of any person, habitual or otherwise, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, in said county of Washington, in whole or in part, of such person or persons, and recover full damages,"

6—See Schouler Dom. Rel. 631, which exist in some of the States 632, and cases cited. Merely hiring a servant already hired to another held not actionable, when no malice, deception or fraud. *Kline v. Eubanks*, 109 La. 241, 33 So. 211. authorizing the wife to sue for and recover the moneys paid by the husband for liquors illegally sold to him, or those which invalidate the leases of buildings to be used for the sale of liquors in violation of law, &c., except where

7—We have not thought it worth while to give the provisions they give special actions of tort.

etc. The act is evidently defective, probably in consequence of some accidental omission.⁸

Connecticut. “Whoever shall sell intoxicating liquor to any *person, who thereby becomes intoxicated, and [*284] while so intoxicated shall, in consequence thereof, injure the person or property of another, shall pay just damages to the person injured, to be recovered in an action under this statute; and if the person selling such intoxicating liquor is licensed, the recovery of a judgment for such damages shall be conclusive evidence of a breach of the bond.”⁹

Illinois. “Every person who shall, by the sale of intoxicating liquors, with or without a license, cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and two dollars per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in an action of debt before any court having competent jurisdiction.

“Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for

8—*Laws of 1873* p. 385.

9—*General Statutes, Revision of 1875*, p. 269, § 9.

all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suits and to control the same and the amount recovered, as a *femme sole*; and all damages recovered by a minor under this act, shall be paid either to such minor, or to his or her parent, guardian or next friend, as the court shall direct; and the unlawful sale, or giving away of intoxicating liquors, shall work a forfeiture of [*285] all *rights of the lessee or tenant under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this act may be by any appropriate action in any of the courts of this State having competent jurisdiction.

“The giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, shall be held to be an unlawful selling.”¹⁰

Statutes giving such action, it seems, are to be construed strictly.¹¹ The person to whom the liquor is sold cannot recover under the statute for his own intoxication.¹² The wife can maintain no action unless she can show injury in person, property, or means of support. Anguish or pain of mind or the feelings suf-

10—Rev. Stats. 1874, p. 438 §§ 8, 9 and 13, re-enacting sections, 4, 5 and 7 of Laws of 1872, p. 553.

11—Freese v. Tripp, 70 Ill. 496; Meidel v. Anthis, 71 Ill. 241; Kellerman v. Arnold, 71 Ill. 632; Fentz v. Meadows, 72 Ill. 540; Cruse v. Aden, 127 Ill. 231, 20 N. E. 73, 3 L. R. A. 327. The landlord's liability does not cover reversioners or holders of contingent interests. Castle v. Fogerty, 19 Ill. App. 442. The act only applies to those engaged in liquor traffic. It does not cover a case of giving a drink from kindness or courtesy. Aden v. Cruse, 21 Ill. App. 391. In the last case on appeal it was said that the “act does not apply to persons who are not, either directly or indirectly, or in

any way or to any extent, engaged in the liquor traffic, and that the right of action given by said section to one injured in her means of support is not intended to be given against a person who, in his own house or elsewhere, gives a glass of intoxicating liquor to a friend as a mere act of courtesy and politeness, and without any purpose or expectation of pecuniary gain or profit.” Cruse v. Aden, 127 Ill. 231, 239, 20 N. E. 73, 3 L. R. A. 327.

12—People v. Linck, 71 Ill. App. 358. “The party complaining and seeking damages must be free from complicity in procuring the intoxication.”

ferred by her by reason of her husband's intoxication are not elements of damages.¹³ Exemplary damages cannot be awarded unless actual damages are proved, and then they may be if aggravating circumstances are shown.¹⁴ It is sufficient to justify exemplary damages that the defendant knew that the person was intoxicated or in the habit of becoming so,¹⁵ or that he had been warned not to sell to him for that reason.¹⁶ The defendant when exemplary damages are claimed, may show facts in mitigation, such as that he had forbidden his clerk, by whom the sale was made, to sell to the defendant,¹⁷ or that the wife and husband drank liquors together.¹⁸ Proof of injury to means

13—*Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Fentz v. Meadows*, 72 Ill. 540; *Flynn v. Fogarty*, 106 Ill. 263; *Borgasen v. Eklund*, 96 Ill. App. 443. She can recover only for such damage as is the direct proximate effect of a particular intoxication. *Barks v. Woodruff*, 12 Ill. App. 96. The mere intoxication of the husband, unaccompanied with any injury to the person of the wife, or to his or her means of support, gives no right of action. *Confrey v. Stark*, 73 Ill. 187. The inconveniences and hardships suffered by the wife may not be shown. *Hanewacker v. Ferman*, 152 Ill. 321, 38 N. E. 924. The damages must arise from intoxication, not from partial intoxication. *Gintz v. Bradley*, 53 Ill. App. 597.

14—*Roth v. Eppy*, 80 Ill. 283, explaining *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Kellerman v. Arnold*, 71 Ill. 632; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540; *Bates v. Davis*, 76 Ill. 222; *Albrecht v. Walker*, 73 Ill. 69; *Brantigam v. White*, 73 Ill. 561; *Graham v. Fulford*, 73 Ill. 596; *Hack-*

ett v. Smelsley, 77 Ill. 109; *McEvoy v. Humphrey*, 77 Ill. 388; *Cobb v. People*, 84 Ill. 511; *Schimmelfenig v. Donovan*, 13 Ill. App. 47; *Kadgin v. Miller*, Id. 474; *Murphy v. Curran*, 24 Ill. App. 475.

15—*Kennedy v. Sullivan*, 136 Ill. 94, 26 N. E. 382; *Betting v. Hobbett*, 142 Ill. 72, 30 N. E. 1048; *Wolfe v. Johnson*, 152 Ill. 280, 38 N. E. 886; *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208; *Betting v. Hobbett*, 42 Ill. App. 174; *Buck v. Maddock*, 67 Ill. App. 466.

16—*McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1027; *Siegle v. Rush*, 173 Ill. 559, 50 N. E. 1008; *Hanewacker v. Ferman*, 47 Ill. App. 17.

17—*Freese v. Tripp*, 70 Ill. 496; *Fentz v. Meadows*, 72 Ill. 540; *Brantigam v. White*, 73 Ill. 561; *Bates v. Davis*, 76 Ill. 222. But the fact that the sales were made by a clerk in violation of instructions would be no defense to the action. *Keedy v. Howe*, 72 Ill. 133.

18—*Roth v. Eppy*, 80 Ill. 283; *Hackett v. Smelsley*, 77 Ill. 109. See *Reget v. Bell*, 77 Ill. 593. The liability of the defendant to indictment for the same act is no

[*286] of support need not be direct, *but is to be made out by circumstances,¹⁹ and it is no excuse to the defendant that he could not reasonably have foreseen the consequences.²⁰ Neither is it a defense that others also sold liquors to the husband,²¹ but where several are liable there can be but one recovery for the injury.²² If the defendant sold liquor which contributed to the intoxication in question, it is sufficient to establish liability,²³ and all who contribute are jointly and severally liable,²⁴ and, in the latter case, a release of one is a release of all.²⁵ The damages cannot be apportioned among the defendants, but each is liable for the entire amount.^{25a} The damage sustained must be correctly described in the declaration; if the wife complains only of loss of means of support, evidence should not be received of an injury to the person of the wife.²⁶ The widow may bring the action after the death of the husband caused by intoxication, and recover for the loss of support resulting from such death.²⁷

bar to exemplary damages. *Bran-non v. Silvernail*, 81 Ill. 434.

19—*Horn v. Smith*, 77 Ill. 381; *Roth v. Eppy*, 80 Ill. 283. As to what constitutes an injury to means of support, see *Meidel v. Anthis*, 71 Ill. 241; *Hackett v. Smelsley*, 77 Ill. 109; *McCann v. Roach*, 81 Ill. 213.

20—*Roth v. Eppy*, 80 Ill. 283.

21—*Emory v. Addis*, 71 Ill. 273; *Hackett v. Smelsley*, 77 Ill. 109. See *O'Leary v. Frisbey*, 17 Ill. App. 553; *Kelley v. Malhoit*, 115 Ill. App. 23. If some defendants by sales have produced the habit of drinking and others by sales the particular intoxication which resulted in death, only the latter can be held by the widow. *Tetzner v. Naughton*, 12 Ill. App. 148.

22—*Emory v. Addis*, 71 Ill. 273.

23—*Smith v. People*, 141 Ill. 447, 31 N. E. 425; *Lloyd v. Kelly*, 48 Ill. App. 554.

24—*Buckworth v. Crawford*, 24

Ill. App. 603; *Lane v. Tippy*, 52 Ill. App. 532.

25—*Stanley v. Leahy*, 87 Ill. App. 465.

25a—*Earp v. Lilly*, 217 Ill. 582, 75 N. E. 552.

26—*Hackett v. Smelsley*, 77 Ill. 109.

27—*Hackett v. Smelsley*, 77 Ill. 109; *Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216; *McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1027; *Smith v. People*, 141 Ill. 447, 31 N. E. 425; *Meyer v. Butterbrodt*, 146 Ill. 131, 34 N. E. 152; *Shorb v. Webber*, 188 Ill. 126, 58 N. E. 949; *McMahon v. Sankey*, 35 Ill. App. 341; *Smith v. People*, 38 Ill. App. 638; *Campbell v. Magruder*, 39 Ill. App. 604; *Meyer v. Butterbrodt*, 43 Ill. App. 312; *Marshall v. Laughran*, 47 Ill. App. 29; *Shorb v. Webber*, 89 Ill. App. 474. To permit recovery for death she must show a sale or gift of the liquor, which wholly, or in part, caused the in-

So where the plaintiff's husband was killed by an intoxicated person and the killing was a consequence of this intoxication, she may recover for loss of support from those who caused the intoxication.²⁸ Children may sue for loss of support caused by the death of their father from intoxication,²⁹ and parents for the death of their son.³⁰

The word "support" in the statute does not mean merely the bare necessities of life, but includes whatever is suitable to the condition of the parties.³¹ The amount of actual damages is largely in the discretion of the jury. "The jury must determine that question as practical men, upon the evidence before them, as best they can, and unless their finding is clearly excessive, it will not be disturbed."³² Where the loss of support results from

toxication; death caused by the intoxication; injury from the death to her means of support. *Flynn v. Fogarty*, 106 Ill. 263. A death resulting from an assault committed upon the husband for abusive language used by him while intoxicated, is not to be referred to the sale of the liquor as the cause. *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359. A fall suffered by a wife while following her intoxicated husband to see where he got liquor, is not the natural and proximate result of the sale. *Johnson v. Drummond*, 16 Ill. App. 641. But a person shot by a drunken man because of the intoxication, may recover of the seller. *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14. Where one is killed by a train while drunk, the death cannot be said not to be a proximate result of the sale when he had to cross tracks to reach his home in going from the saloon. *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236. As to intoxication being proximate

cause of death see *Meyer v. Butterbrodt*, 146 Ill. 131, 34 N. E. 152; *Meyer v. Butterbrodt*, 43 Ill. App. 312.

28—*Pickard v. Teatro*, 34 Ill. App. 398; *Munz v. People*, 90 Ill. App. 647. But not if the plaintiff's husband provoked the quarrel which lead to the homicide. *Sauter v. Anderson*, 112 Ill. App. 580.

29—*Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208; *Stecher v. People*, 217 Ill. 348, 75 N. E. 501; *Buck v. Maddock*, 67 Ill. App. 466. Only a preponderance of evidence is necessary to make out a case for the plaintiff, in cases where the loss of support results from death. *Woods v. Dailey*, 211 Ill. 495, 71 N. E. 1068.

30—*Helmuth v. Bell*, 150 Ill. 263, 37 N. E. 230; *Lossman v. Knights*, 77 Ill. App. 670.

31—*McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1027; *Herring v. Ervin*, 48 Ill. App. 369. And see *Jury v. Ogden*, 56 Ill. App. 100.

32—*Brown v. Butler*, 66 Ill.

an injury to the intoxicated person, due to his intoxication, it is error for the court to instruct the jury on the degree of intoxication necessary for a recovery, but the question whether there was intoxication and whether the injury was a consequence thereof is wholly for the jury.³³ Where the plaintiff was injured by reason of an intoxicated person driving into her carriage, the defendants who caused the intoxication were held liable.³⁴ And where, by reason of intoxication, a father committed a crime and then absconded, his minor child was held entitled to recover for loss of support.³⁵

The section for the recovery of two dollars per day for taking charge of and providing for the intoxicated person has no application to the case of intoxication caused by liquors given to him.³⁶ The sum can only be recovered in an action of debt as

App. 86. As to the evidence proper on the question of damages see *Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216; *Betting v. Hobbett*, 142 Ill. 72, 30 N. E. 1048; *Miller v. Smith*, 25 Ill. App. 67; *Malony v. Daily*, 67 Ill. App. 427; *Coleman v. People*, 78 Ill. App. 210; *McLees v. Niles*, 93 Ill. App. 442; *Corkings v. Meier*, 112 Ill. App. 655.

33—*Shorb v. Webber*, 89 Ill. App. 474; *Tipton v. Shuler*, 87 Ill. App. 517. In the last case the court says: "To entitle the plaintiff to recover, it was not necessary that the proof show that the intoxication of her husband at the time of receiving the injury was such that his judgment, memory and reasoning were so impaired that he did not know the natural and reasonable consequences of his own acts. The degree of intoxication necessary for recovery is essentially a question of fact; and an instruction which attempts to settle or

comprehend the state of intoxication necessary in order to fix the liability of the defendant is clearly foreign to the province of the judge presiding. * * * In either case, or in any case, the degree or nature of intoxication is immaterial if it is clear that the intoxication directly caused the injury complained of." p. 518.

34—*Kennedy v. Whittaker*, 81 Ill. App. 605.

35—*Loftus v. Hamilton*, 105 Ill. App. 72. A mortgagor out of possession was held not liable, as one having knowingly permitted the premises to be rented for a saloon. *Bell v. Cassem*, 56 Ill. App. 260. In a suit on a saloon keeper's bond, a former judgment against the saloon keeper and his landlord was held *prima facie* to fix the amount of damages against the sureties, they having been notified of the suit. *Wanack v. People*, 187 Ill. 116, 58 N. E. 242.

36—*Brannan v. Adams*, 76 Ill. 331.

prescribed in the statute;³⁷ and the sum named in the statute is the limit of the recovery.³⁸ The wife may sue under this section for services in caring for her intoxicated husband.³⁹ The section is penal in character and is to be strictly construed.⁴⁰

***Indiana.** "Any person or persons who shall, by the [*287] sale of intoxicating liquor, with or without permit, cause the intoxication, in whole or in part, of any other person, shall be liable for and be compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, for every day he or she is so cared for, which sum may be recovered in an action of debt before any court having competent jurisdiction."⁴¹

"In addition to the remedy and right of action provided for in section eight of this act, every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, severally or jointly, against any person or persons who shall, by selling, bartering or giving away intoxicating liquors, have caused the intoxication, in whole or in part, of such person; and any person or persons owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquor is to be sold therein, or having leased the same for other purposes, shall knowingly permit therein the sale of intoxicating liquor, or who having been informed that intoxicating liquor is sold therein that has caused, in whole or in part, the intoxication of any person, who shall not immediately,

37—*Confrey v. Stark*, 73 Ill. 187.

38—*Brannan v. Adams*, 76 Ill. 331.

39—*McVey v. Williams*, 91 Ill. App. 144.

40—*Shulte v. Menke*, 111 Ill. App. 212. In *Robinson v. Randall*, 82 Ill. 521, it is held that the mere fact that one has a prejudice against persons engaged in

the sale of intoxicating liquors does not disqualify him from sitting as a juror, but if he will not give the same weight to the testimony of one so engaged that he would to persons engaged in other business, he is disqualified.

41—General Laws, 1873, p. 154, § 8.

after being so informed, take legal steps, in good faith, to dispossess said tenant or lessee, shall be liable jointly with the person selling, bartering, or giving away intoxicating liquor as aforesaid, to any person or persons injured, for all damages, and for exemplary damages: *Provided, however*, that execution on any such judgment shall first be levied on the property of the person selling, bartering or giving away such liquor; and in the event of a failure or insufficiency of such property to satisfy the judgment, then on the property of the other defendants. A married

woman shall have the same rights to bring suit and to [*288] control the same, and the amount received as a *femme sole*, and all damages received by a minor under this act, shall be paid either to such minor or to his or her parent, guardian, or next friend, as the court shall direct. The unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent, upon the premises where such unlawful sale, bartering, or giving away shall take place. All suits for damages under this act may be by any appropriate action in any of the Courts of this State having competent jurisdiction. All judgments recovered under the provisions of this act may be enforced without any relief or benefit from the valuation or appraisement laws."⁴²

Under this provision a wife bringing suit must establish the following facts: 1. The intoxication of the husband, habitual or otherwise. 2. That she has been injured in person or property,

42—General Laws, 1873, p. 155, § 12. This act was repealed in 1875, and a new act substituted which required a bond of all dealers in liquors, to be given to the State and filed with the county auditor, and contained the following provision: "Every person who shall sell, barter, or give away any intoxicating liquors in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond filed in the auditor's office, as re-

quired by section four of this act, to any person who shall sustain any injury or damage to their person or property, or means of support, on account of the use of such intoxicating liquors so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction." General Laws, Special Session, 1875, p. 59, § 20. No decisions are reported under this provision. See *Mulcahey v. Givens*, 115 Ind. 286, 17 N. E. 598.

or means of support, in consequence of such intoxication. 3. That the intoxication from which the injury resulted was caused, in whole or in part, by the selling, bartering, or giving of intoxicating liquors to her husband by the defendant.⁴³ Each person who, by selling, bartering, or giving intoxicating liquors, contributed in part to the intoxication causing the injury complained of, is liable to the full extent of the injury, and all such persons may be joined, or one may be sued.⁴⁴ And a clerk or salesman who sells liquor is a joint wrong-doer with his principal, and may be joined in an action with him.⁴⁵ A wife sufficiently avers her injury by alleging that her husband was intoxicated by liquor purchased of the defendant, and thereby neglected his work and squandered his money, and damaged *the plaintiff in her means of support.⁴⁶ One who was [*289] prevented from following his usual occupation by being struck, beaten, and wounded by an intoxicated person, was held entitled to a remedy against the liquor-seller under this statute, and was not required to join the intoxicated person as co-defendant.⁴⁷ So the wife may recover for personal injuries received by the overturning of a wagon in which she was being driven by her intoxicated husband,⁴⁸ or by being driven out of the house in cold weather.⁴⁹ So, where the defendant sold liquor to the plaintiff's husband while intoxicated and the latter, in consequence, committed murder and was sent to the penitentiary.⁵⁰ But where an

43—*Fountain v. Draper*, 49 Ind. 441.

44—*Fountain v. Draper*, 49 Ind. 441.

45—*Barnaby v. Wood*, 50 Ind. 405; *English v. Beard*, 51 Ind. 489.

46—*Barnaby v. Wood*, 50 Ind. 405. See *Schlosser v. State*, 55 Ind. 82.

47—*English v. Beard*, 51 Ind. 489. The liquor seller is liable to the owner of a horse borrowed by the buyer of the liquor for injury to it due to the buyer's inability to drive after being placed in the

vehicle by the seller. *Dunlap v. Wagner*, 85 Ind. 529.

48—*Mulcahey v. Givens*, 115 Ind. 286, 17 N. E. 598.

49—*Beem v. Chestnut*, 120 Ind. 390, 22 N. E. 303.

50—*Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154. The court says: "Under the act it is necessary that two things should concur besides the sale or gift of the liquor by the defendant to constitute a cause of action, to wit, intoxication resulting from its use in whole or in part, and the loss of the means of support by the plaintiff in conse-

intoxicated person, while in that condition, received an injury which he would not have received if sober, and which resulted in his death, the intoxication, it was held, was only the remote cause of the death, and therefore an action could not be sustained by his widow under the statute.⁵¹ Later cases hold that there may be a recovery in such case.⁵² Under section eight, above quoted, the plaintiff was entitled to recover for taking care of the intoxicated person only for the time he remained intoxicated.⁵³

When the wife sues, her anxiety of mind, mortification, sorrow and loss of her husband's society cannot enter into the measure of damages she may recover; and if the sale of liquor to the husband was an illegal act, exemplary damages cannot be awarded, as that would be in effect to expose the seller to double punishment.⁵⁴

This legislation is constitutional,⁵⁵ and it applies to those licensed to sell intoxicating liquors as well as to others.⁵⁶ It is not necessary, when the wife sues for an injury in her person and means of support, that she should unite her husband with her as plaintiff.⁵⁷

Iowa. "Any person who shall, by the manufacture or sale of intoxicating liquors, contrary to the provisions of this chapter, quence of such intoxication. The statute requires nothing more. The act itself establishes a rule of evidence, applicable to and controlling in all cases arising under its provisions, which in some respects is new, and has produced a radical change of the common law rule. The statute makes no distinction whether the loss of the means of support is the direct or remote result of the intoxication. It only requires that it should be established that the loss of the means of support is the result of such intoxication." p. 474.

51—*Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559; *Backus v. Dant*, 55 Ind. 181.

52—*McCarty v. State*, 162 Ind. 218, 70 N. E. 131; *Boos v. State*,

11 Ind. App. 1257, 39 N. E. 197; *Smiser v. State*, 17 Ind. App. 519, 47 N. E. 229; *Baecher v. State*, 19 Ind. App. 100, 49 N. E. 42; *Nelson v. Hunter*, 32 Ind. App. 88, 69 N. E. 298.

53—*Krach v. Hellman*, 53 Ind. 517. Proof that beer was sold, without showing what kind of beer, or that it was intoxicating, does not show an unlawful sale. *Schlosser v. State*, 55 Ind. 82.

54—*Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34; *Schafer v. Smith*, 63 Ind. 226.

55—*Wilkerson v. Rust*, 57 Ind. 172, citing the preceding cases.

56—*Wilkerson v. Rust*, 57 Ind. 172.

57—*Mitchell v. Ratts*, 57 Ind. 259.

cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and one dollar per day in *addition thereto for [*290] every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in a civil action before any court having jurisdiction thereof.'⁵⁸

"Every wife, child, parent, guardian, employer, or other person, who shall be injured in person or property or means of support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, shall have a right of action, in his or her own name, against any person who shall, by selling intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages; and a married woman shall have the same right to bring suit, prosecute and control the same, and the amount recovered, as if a single woman; and all damages recovered by a minor under this section shall be paid either to such minor or his parent, guardian, or next friend, as the court shall direct, and all suits for damages under this section shall be by civil action in any court having jurisdiction thereof.'⁵⁹

The words "any person who shall, by selling," etc., in a previous statute, giving a similar right, were held to embrace any person making the sale, whether the owner or the son, clerk or servant of the owner.⁶⁰ A joint action will not lie against several persons whose places of business are distinct, who make separate sales of liquor to the same person, at least where it does not appear that such sales caused a single act of intoxication.⁶¹ It is not enough that their sales contributed to a general besotted condition.⁶² The later cases hold that if the damages arise from

58—Code of 1873, p. 288, § 1556. The chapter is the Prohibitory Liquor Law, so called.

59—Ibid. § 1557.

60—State v. Stricker, 33 Iowa, 395; Worley v. Spurgeon, 38 Iowa, 465.

61—La France v. Krayner, 42 Iowa, 143. Each one who con-

tributes to the intoxication is liable only for the damage caused by his own act. Richmond v. Shickler, 57 Ia. 486; Flint v. Gauer, 66 Ia. 696; Higgins v. Kavanaugh, 52 Ia. 368.

62—Hitchner v. Ehlers, 44 Iowa,

40.

a single act of intoxication, all who have contributed to the production of it are jointly and severally liable,⁶³ whereas, if the damages arise from habitual intoxication, each person who has contributed thereto by sales of liquor, is liable only for his own acts, and not for the entire damage.⁶⁴ To render the defendant liable in the latter case he must have contributed to the habitual intoxication and not merely to the drinking habit, which eventually results in habitual intoxication⁶⁵ The wife suing cannot recover, unless she shows an actual injury.⁶⁶ And where she sues for an injury to her means of support by the sale of intoxicating liquors to her husband, the question what circum-

[*291] stances will warrant exemplary *damages is for the jury, and the court should not instruct the jury that certain facts should or should not aggravate the damages.⁶⁷ In a late

63—*Cox v. Newkirk*, 73 Ia. 42, 34 N. W. 492; *Faivre v. Mandercheid*, 117 Ia. 724, 90 N. W. 76. See *Arnold v. Barkalow*, 73 Ia. 183, 34 N. W. 807.

64—*Bellison v. Apland*, 115 Ia. 599, 89 N. W. 22.

65—*Cox v. Newkirk*, 73 Ia. 42, 34 N. W. 492; *League v. Ehmke*, 120 Ia. 464, 94 N. W. 938.

66—*Calloway v. Laydon*, 47 Ia. 456, 29 Am. Rep. 489. Evidence of abusive language and conduct is inadmissible unless it has affected the woman's health. *Welch v. Jugenheimer*, 56 Ia. 11, 41 Am. Rep. 77. But mental suffering if the result of injury to the person may be compensated. *Ward v. Thompson*, 48 Ia. 588.

67—*Goodenough v. McGrew*, 44 Iowa, 670. But later it has been held that the plaintiff has a right to such damages in every case where there has been a willful violation of the statute which has occasioned injury. *Fox v. Wunderlich*, 64 Ia. 187. See *Weitz v. Ewen*, 50 Ia. 34; *Ward v. Thomp-*

son, 48 Ia. 588; *Thill v. Pohlman*, 76 Ia. 638, 41 N. W. 385. Under another statute providing a forfeiture to the school fund by any person who should give or sell intoxicating liquors to an intoxicated person, it was held not necessary to prove that defendant knew the person was intoxicated. *Church v. Higham*, 44 Iowa, 482. Wine is "intoxicating liquor." *Worley v. Spurgeon*, 38 Iowa, 465. If the wife voluntarily contributes to the intoxication she cannot recover. *Huff v. Aultman*, 69 Ia. 71, 58 Am. Rep. 213. But she may if she buys from compulsion or to keep husband at home. *Ward v. Thompson*, 48 Ia. 588. Or if she did not assent to the sale causing the particular intoxication from which injury ensued. *Rafferty v. Buckman*, 46 Ia. 195. Plaintiff need not prove her case beyond a reasonable doubt. *Welch v. Jugenheimer*, 56 Ia. 11, 41 Am. Rep. 77. To hold the owner liable it was held that it must appear that he knew and consented to the

case it is held that, in the matter of damages, the question is what has the plaintiff actually lost in the way of support by the intoxication of her husband to be measured by what he has provided, not by what he ought to have provided.⁶⁸ A recovery may be had, though death ensues.^{68a}

Kansas. "Every person who shall, by the sale, barter or gift of intoxicating liquors, cause the intoxication of any other person, such person or persons shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and five dollars per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication; which sum may be recovered by a civil action before any court having jurisdiction.

"Every wife, child, parent, guardian, employer or other person, who shall be injured in person or property or means of support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, such wife, child, parent, guardian, employer or other person shall have a right of action in his or her own name against any person who shall, by selling, bartering or giving intoxicating liquors, have caused the intoxication of such person, for all damages actually sustained,

sale to the person in question. *Meyers v. Kirk*, 57 Ia. 421; but the consent may be inferred from circumstances. *Loan v. Etzel*, 62 Ia. 429. But under the present act mere knowledge of the use of the building is enough. *Judge v. Flournoy*, 74 Ia. 164, 37 N. W. 130.

68—*Bellison v. Apland*, 115 Ia. 599, 89 N. W. 22. And see on damages, *Thill v. Pohlman*, 76 Ia. 638, 41 N. W. 385; *Shull v. Arie*, 113 Ia. 170, 84 N. W. 1031. In *Faivre v. Mandercheid*, 117 Ia. 724, 90 N. W. 76, where the husband's hands and feet were frozen by reason of his intoxication and partial amputation became neces-

sary and his labor was the only means of support for the family, a judgment for \$6,000 in favor of the wife was sustained. Injury to the wife's health resulting from threats of bodily injury may be considered. *League v. Ehmke*, 120 Ia. 464, 94 N. W. 938. In a suit to make a judgment against the saloon keeper a lien on the premises occupied by him, it was held that the judgment was not evidence of the amount of damages as against the landlord. *McVey v. Manatt*, 80 Ia. 132, 45 N. W. 548.

68a—*Jarozewski v. Allen*, 117 Ia. 632, 91 N. W. 941.

as well as exemplary damages; and a married woman shall have the right to bring suits, prosecute and control the same [*292] and the amount *recovered, the same as if unmarried; and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parents, guardian or next friend, as the court shall direct; and all suits for damages, under this act, shall be by civil action in any of the courts of this State having jurisdiction thereof.

“The giving away of intoxicating liquors, or other shifts or device to evade the provisions of this act, shall be deemed and held to be an unlawful selling within the provisions of this act.”⁶⁹

Under the statute a husband may recover damages because of the intoxication of his wife.⁷⁰

Maine. The Prohibitory Liquor Law, so called, provides that if any person not authorized as thereby provided “shall sell any intoxicating liquors to any person, he shall be liable for all the injuries which such person may commit while in a state of intoxication resulting therefrom, in an action on the case in favor of the person injured.”⁷¹

69—General Statutes, 1868, p. 399, §§ 9, 10, and 11. Laws of 1881, ch. 128, § 15. While each child has a right of action, the children cannot bring a joint action. *Durein v. Pontious*, 34 Kan. 353. A seller is liable who directly contributes to the intoxication though others have caused it in part. *Werner v. Edmeston*, 24 Kan. 147; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625. The wife is not barred because she signed a petition to allow defendant to sell. *Id.* Exemplary damages are not to be given unless the conduct of the seller has been wanton, reckless or willful. But it is wanton if a sale is made after the wife, finding the husband drunk in

a saloon, has notified the keeper to sell no more to him. *Id.*

70—*Landrum v. Flannigan*, 60 Kan. 436, 56 Pac. 753.

71—Rev. Stat. 1871, p. 304, § 32. In Rev. Stat. Me. 1883 Ch. 27 § 49, are provisions in the main like those in § 21 of Mass. Act printed below. There can be no exemplary damages without actual damages. *Gilmore v. Mathews*, 67 Me. 517. The owner who knowingly has a building in which liquors are kept for sale is liable. The cause of action is the causing or contributing to intoxication. *McGee v. McCann*, 69 Me. 79. Parents cannot join in an action for death of son caused by intoxication. *Id.*

A later law is as follows:

"Every wife, child, parent, guardian, husband, or other person who is injured in person, property or means of support or otherwise, by any intoxicated person, or by reason of the intoxication of any person, has a right of action in his own name against anyone who by selling or giving any intoxicating liquors, or otherwise, has caused or contributed to the intoxication of such person; and in such action the plaintiff may recover both actual and exemplary damages. The owner, lessee or person renting or leasing any building or premises, having knowledge that intoxicating liquors are sold therein, are liable, severally or jointly with the person selling or giving intoxicating liquors, as aforesaid. And in actions by a wife, husband, parent or child, general reputation of such relationship is *prima facie* evidence thereof, and the amount recovered by a wife or child shall be her or his sole and separate property."⁷²

In regard to the construction of the latter statute, it is held that "while such a statute which gives a remedy unknown to the common law, should not be enlarged, it should, of course, be so construed, where the language is clear and explicit, as to give it its true meaning, having in view the purpose of the statute."⁷³ It was accordingly held in the case referred to that the wife may recover for loss of means of support resulting from the death of her husband by reason of his intoxication.⁷⁴ The statute is

72—R. S. 1903, C. 29, § 58, p. 336. See R. S. 1883, C. 27, § 49. Acts, 1872, C. 6, § 4.

73—Gardner v. Day, 95 Me. 558, 50 Atl. 892.

74—The court says: "We are unable to perceive any legal distinction, except in degree, between a temporary injury to the wife's means of support through the husband's inability to provide support by reason of some accident sustained while intoxicated, and the permanent injury suffered by her of the same nature by reason of the husband's death result-

ing from his intoxication. In either case, the injury is to her means of support by reason of his intoxication. * * * A wife cannot of course recover under this statute for the death of her husband, nor for her mental suffering caused thereby, nor for any of the consequences of his death, except for the injury to her means of support by reason of his intoxication; but if his death is the proximate result of such intoxication, she is none the less injured in her means of support thereby, within the meaning of the statute

held to create a new cause of action, and though it provides in terms for the recovery of "both actual and exemplary damages," it is held that exemplary damages are governed by the same rules as in other cases. "The legislature did not intend by the act to make any change in the rules governing the recovery of exemplary damages. It did not intend that such damages might be recovered in all such actions, without regard to the circumstances attending and accompanying the wrongful act of the defendant; but simply to place this new class of wrongs, created and defined by the statute, upon the same footing and subject to the same rules of damages as other actionable torts."⁷⁵

Massachusetts. "Every husband, wife, child, parent, guardian, employer, or other person, who is injured in person, property, or means of support, by an intoxicated person, or in consequence of intoxication habitual or otherwise of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons, who, by selling or giving intoxicating liquor, have caused, in whole or in part, such intoxication; any person or persons, owning, renting, leasing, [*293] or per*mitting the occupation of any building or premises, and having knowledge that intoxicating liquor is to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquor, shall, if any such liquor sold or given therein causes in whole or in part, the intoxication of a person, be liable, severally or jointly with the person or persons selling or giving intoxicating liquor as aforesaid, for all damages sustained; and the same may be recovered in an action of tort: *Provided*, that no lessor of real estate shall be liable for such damages if the occupant holds a license for the sale of such liquor: and provided, further, that no owner or lessor of any building or premises held under lease, on the 13th day of April, in the year 1879, shall be liable under the provisions of this section for any damages resulting from the lawful sale or giving away of spirits or intoxi-

as we construe it." *Gardner v.* 75—*Campbell v. Harmon*, 96 Me. Day, 95 Me. 558, 561, 50 Atl. 892. 87, 51 Atl. 801.

cating liquor on said premises during the term of said lease. A married woman may bring such action in her own name, and all damages recovered by her shall enure to her separate use; and all damages recovered by a minor shall be paid over to such minor, or to such person in trust for him, and on such terms, as the court may direct. In case of the death of either party the action and right of action shall survive to or against his executor or administrator. The party injured, or his or her legal representative may bring either a joint action against the person intoxicated and the person or persons who furnished the liquor, or a separate action against either.

“Whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, or allows a minor to loiter upon the premises where such sales are made, shall forfeit one hundred dollars for each offense, to be recovered by the parent or guardian of such minor, in an action of tort.

“The husband, wife, parent, child, guardian or employer of any person who has or may hereafter have the habit of drinking spirituous or intoxicating liquor to excess, may give notice in writing, signed by him or her, to any person requesting him not to sell or deliver spirituous or intoxicating liquor to the person having such habit. If the person so notified at any time, within twelve months thereafter, sells or delivers any such liquor to the person having such habit, or permits such person to loiter on his premises, the person giving the notice may, in an action of tort, recover of the person notified such sum not less than one *hundred nor more than five hundred dollars, as [*294] may be assessed as damages: *Provided*, the employer giving said notice shall be injured in his person or property. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use. In case of the death of either party, the action and right of action shall survive to or against his executor or administrator.’”⁷⁶

76—Pub. St. Mass. Ch. 100, § 21, be construed to include ale, porter, 24, 25. A subsequent section provides that “the terms intoxicating strong beer, lager beer, cider, and all wines, as well as distilled spirits.”

Michigan. "Every wife, child, parent, guardian, husband, or other person who shall be injured in person or property or means of support by any intoxicated person, or by reason of the intoxication of any person, or by the reason of the selling, giving, or furnishing any spirituous, intoxicating, fermented or malt liquors to any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to the intoxication of such person or persons, or who have caused or contributed to such injury; and the principal and sureties to the bond hereinafter mentioned, shall be liable, severally and jointly, with the person or persons so selling, giving, or furnishing any spirituous, intoxicating, or malt liquors as aforesaid; and in any such action provided for in this section [*295] the *plaintiff shall have a right to recover actual and exemplary damages. And in every action by any wife, hus-

A dealer who has been requested by a wife not to sell to her husband who drinks to excess, is liable for his servant's sale to such husband although the servant negligently disobeys orders in making such sale. *George v. Gobey*, 123 Mass. 289, 35 Am. Rep. 376. What is a sufficient notice. *Kennedy v. Saunders*, 142 Mass. 9. A husband may maintain an action for injury to his means of support by selling his wife liquor. *Moran v. Goodwin*, 130 Mass. 158, 39 Am. Rep. 443. If a defendant has caused the intoxication in whole or in part, he is liable for the whole damage. There is no apportionment of damage. *Bryant v. Tidgewell*, 133 Mass. 86. A release of one of several who have contributed to the intoxication releases all. *Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. 170. But no recovery can be had for intoxication caused by a habit to the formation of which a defendant has

contributed, unless he caused the particular intoxication complained of. *Id.* There is nothing in the act giving a right to recover for death due to intoxication. *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456.

A dealer may be liable for selling to a minor, giving to him and allowing him to loiter on the premises, though all three violations were part of the same transaction. The mother may bring an action in such case in the absence of proof that the minor's father is living. *McNeil v. Collinson*, 130 Mass. 167. A father may recover for loss of support through the intoxication of his adult son, though the latter was not legally obliged to contribute to such support. *McNary v. Blackburn*, 180 Mass. 141, 61 N. E. 885. As to the liability of surety on dealer's bond, see *Day v. Frank*, 127 Mass. 497.

band, parent, or child, general reputation of the relation of husband and wife, parent or child, shall be *prima facie* evidence of such relation; and the amount recovered by every wife or child shall be his or her sole and separate property.’’⁷⁷ The previous statute, repealed in 1875, was somewhat less comprehensive. It provided “that every wife, child, parent, guardian, husband, or other person, who shall be injured in property, means of support, or otherwise, by any intoxicated person, or by reason of the intoxication of any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating liquor or otherwise, have caused or contributed to the intoxication of such person or persons; and in any such action the plaintiff shall have a right to recover actual and exemplary damages.’’⁷⁸

Under the repealed statute it was held that one was not liable for the consequences of an unauthorized appropriation of his liquors by another without his knowledge. Nor should he be charged with exemplary damages, unless his conduct was willful, wanton, reckless, or otherwise deserving of punishment beyond what the requirement of mere compensation would impose. But it is no excuse for him that the sale or gift was by his servants employed in his business, and in disobedience of his orders.⁷⁹

77—General Laws, 1875, p. 284, § 3, as amended; General Laws, 1877, p. 213; 1883 p. 215. The bond mentioned is one which every liquor dealer is required to give, the condition of which is not to sell or deliver liquors to any minor, habitual drunkard, or person in the habit of becoming intoxicated, or to any person whose husband, wife, parent, child, guardian or employer shall notify him that he is in the habit of drinking to excess, etc. The sureties on bonds of different principals may be joined in same suit. Franklin v. Frey, 106 Mich. 76, 63 N. W. 970.

78—General Laws of 1871, p.

363. This was an amendment to the Prohibitory Liquor Law, so called. Comp. L. 1871 Ch. 79. The same section declared all payments for liquors sold in violation of law should be “considered as having been received without consideration, and against law and equity, and any money or other property paid therefor may be recovered back by the person paying the same, his wife, or any of his children, or his parent, guardian, husband, or employer.” See Hemmens v. Bentley, 32 Mich. 89.

79—Kreiter v. Nichols, 28 Mich. 496. So under act of 1875. Kehrig v. Peters, 41 Mich. 475. See Smith v. Reynolds, 8 Hun, 128.

The statute contemplates the recovery of damages to the extent of the injury in every case, and of exemplary damages [*296] where they *are appropriate; but there can be no recovery unless there be some injury. The right of action does not spring from the relationship alone, and in the absence of actual damage to the complaining party. If liquors are sold to one previously intemperate, and not supporting his wife, the wife suing is not entitled to recover as for the loss of the sober, intelligent society of the husband and of means of support; the liability must be measured by the effects produced upon the husband and wife as they were, and not as they might have been.⁸⁰

“This statute clearly refers to such injury to persons, property, or means of support as are the direct results of the acts done while intoxicated, and to such other injuries as indirectly result by reason of the intoxication.”⁸¹ In a suit by the wife for the intoxication of her husband, she may recover for the shame and disgrace brought upon her thereby, and for the mental suffering resulting from the acts and condition of her husband, and her exclusion from society.⁸² But this does not apply to a child of eleven suing for the intoxication of her father.⁸³ It is not necessary to show the precise amount of injury to means of support.⁸⁴ In a suit by the wife it is error to admit evidence of the number and ages of her children.⁸⁵ To be entitled to punitive damages, there must be aggravating circumstances, such as disregard of request not to sell, or selling to one known to be in habit of getting intoxicated.⁸⁶ The statute covers loss of sup-

80—*Ganssly v. Perkins*, 30 Mich. 492.

81—*Dennison v. Van Wormer*, 107 Mich. 461, 65 N. W. 274.

82—*Friend v. Dunks*, 37 Mich. 25; *Radley v. Seiter*, 99 Mich. 431, 58 N. W. 366; *Lucker v. Liske*, 111 Mich. 683, 70 N. W. 421; *Lafler v. Fisher*, 121 Mich. 60, 79 N. W. 934. So of mother. *Weiser v. Welch*, 112 Mich. 134, 70 N. W. 434.

83—*Sissing v. Beach*, 99 Mich. 439, 58 N. W. 364.

84—*Lafler v. Fisher*, 121 Mich. 60, 79 N. W. 934.

85—*Larzelere v. Kirchgessner*, 73 Mich. 276, 41 N. W. 488; *Johnson v. Schultz*, 74 Mich. 75, 41 N. W. 865; *Boydan v. Haberstrumpf*, 129 Mich. 137, 88 N. W. 386.

86—*Larzelere v. Kirchgessner*, 73 Mich. 276, 41 N. W. 488; *Weiser v. Welch*, 112 Mich. 134, 70 N. W. 434; *Lafler v. Fisher*, 121 Mich. 60, 79 N. W. 934. See *Kehrig v. Peters*, 41 Mich. 475; *Steele v. Thompson*, 42 Mich. 594.

port by death, where death is the proximate result of intoxication.⁸⁷ So where the loss results from death or injury caused or inflicted by an intoxicated person,⁸⁸ where a wife suffers loss of support by reason of her husband being imprisoned for a crime committed while intoxicated, she may recover, if the husband formed the felonious intent, by reason of the intoxication, or if he was so intoxicated as to be incapable of forming any intent.⁸⁹ A mother may recover for loss of support caused by the intoxication of her son, and though he is an adult and his assistance is purely voluntary.⁹⁰ If the plaintiff in any case has caused or encouraged the traffic she cannot recover.⁹¹ All who have contributed to the same intoxication are jointly and severally liable for all damages resulting to the plaintiff, which are within the purview of the statute.⁹²

Missouri. The statutes require of every dram-shop keeper a bond, and provide that if he shall "sell, give away, or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquors, in any quantity, to any minor, without the permission of the parent, master or guardian of such minor first had and obtained," he shall forfeit and pay to such parent, master, or guardian, for every such offense, fifty dollars, to be recovered by civil action, or in the name of the county on the bond.⁹³

87—*Larzelere v. Kirchgessner*, 73 Mich. 276, 41 N. W. 488; *McMahon v. Dumas*, 99 Mich. 467, 58 N. W. 359; *Eddy v. Courtright*, 91 Mich. 264, 51 N. W. 887; *Lafer v. Fisher*, 121 Mich. 60, 79 N. W. 934.

88—*Brockway v. Patterson*, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708; *Flower v. Witkowsky*, 69 Mich. 371, 37 N. W. 364; *Thomas v. Dansby*, 74 Mich. 398, 41 N. W. 1088; *Doty v. Postal*, 87 Mich. 143, 49 N. W. 534.

89—*Dennison v. Van Wormer*, 107 Mich. 461, 65 N. W. 274.

90—*Eddy v. Courtright*, 31 Mich. 264, 51 N. W. 887; *Weiser v. Welch*, 112 Mich. 134, 70 N. W. 434.

91—*Rosecrants v. Shoemaker*, 60 Mich. 4.

92—*Johnson v. Johnson*, 100 Mich. 326, 58 N. W. 1115; *Jewell v. Welch*, 117 Mich. 65, 75 N. W. 283. There can be no apportionment of liability among several when all their sales contribute to a death. *Steele v. Thompson*, 42 Mich. 594. The "other person" in the statute does not include the user of the liquor where he has had money stolen from him while drunk. *Brooks v. Cook*, 44 Mich. 617, 38 Am. Rep. 282.

93—General Statutes, 1865, p. 421, § 20.

Nebraska. "The person so licensed (to sell intoxicating liquors) shall pay all damages that the community or individuals may sustain in consequence of such traffic; he shall support all paupers, widows and orphans, and the expenses of all civil and criminal prosecutions growing out of or justly attributable to his retail traffic in intoxicating drinks; said damages and expenses to be recovered in any court of competent jurisdiction by any civil action on the bond named and required in section [*297] five hundred and seventy-two, a copy of *which, properly authenticated, shall be taken in evidence in any court of justice in this State; and it shall be the duty of the county clerk to deliver, on demand, such copy to any person who may claim to be injured by such traffic.

"It shall be lawful for any married woman, or other person at her request, to institute and maintain, in her own name, a suit on any such bond for all damages sustained by herself and children on account of such traffic, and the money when collected shall be paid over for the use of herself and children.

"On the trial of any suit under the provisions hereof the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action, to prove that the defendant or defendants sold or gave liquor to the person so intoxicated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action for damages brought by a married woman, or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification."⁹⁴

Where a saloon keeper, while intoxicated from drinking his own liquor, shot and killed the plaintiff's husband, he is not liable under the statute for the plaintiff's loss of support, because there was no traffic within the meaning of the act.⁹⁵ Damages

94—Neb. Comp. Law. 1885; Ch. 50, §§ 15, 16, 18.

95—Curtin v. Atkinson, 36 Neb. 110, 54 N. W. 131.

resulting from the death of a person caused by intoxication may be recovered.⁹⁶ Means of support are not confined to the bare necessities of life, but include what is necessary to enable the plaintiff to live in a style and condition and with a degree of comfort, suitable and becoming the station of the parties.⁹⁷ A wife may not recover for injury to her feelings,⁹⁸ but may for her own money squandered by her husband while intoxicated or spent in the defendant's saloon.⁹⁹ Minor children may sue for the intoxication of their father.¹ The drinker may recover for damages to himself.² All who contribute to the intoxication are jointly and severally liable.³

96—*Roose v. Perkins*, 9 Neb. 304; *Scott v. Chope*, 33 Neb. 41, 49 N. W. 940; *Houston v. Gran*, 38 Neb. 687, 57 N. W. 403; *Chmelir v. Sawyer*, 42 Neb. 362, 60 N. W. 547; *Cornelius v. Hultman*, 44 Neb. 441, 62 N. W. 891; *Gran v. Houston*, 45 Neb. 813, 64 N. W. 345; *Fitzgerald v. Donoher*, 48 Neb. 852, 67 N. W. 880; *Schick v. Sanders*, 53 Neb. 664, 74 N. W. 39. Death need not have been foreseen as a result of the sale. Here it occurred in a quarrel. *McCay v. Worrall*, 18 Neb. 44. A pauper supported by her son may recover for sale which caused the son's death. *Id.* The widow and children may sue jointly if they form a family. *Roose v. Perkins*, 9 Neb. 304; *Houston v. Gran*, 38 Neb. 687, 57 N. W. 403. The fact that the wife consented or acquiesced in the sale of liquor to her husband does not bar her suit. *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245.

97—*Gorey v. Kelly*, 64 Neb. 605, 90 N. W. 554.

98—*Elshire v. Schuyler*, 15 Neb. 561.

99—*Greenlee v. Schoenheit*, 23

Neb. 669, 37 N. W. 600. On measure of damages, see *Warrick v. Rounds*, 17 Neb. 411. Where the suit is for damages resulting from death caused by intoxication, what the plaintiff's have received from the estate of the deceased cannot be taken into account in mitigation of damages. *Houston v. Gran*, 38 Neb. 687, 57 N. W. 403.

1—*Bloedel v. Zimmerman*, 41 Neb. 695, 60 N. W. 6.

2—*Buckmaster v. McElroy*, 20 Neb. 557, 31 N. W. 76.

3—*Kerkow v. Bauer*, 15 Neb. 150; *Wardell v. McConnell*, 23 Neb. 152, 36 N. W. 278; *Chmelir v. Sawyer*, 42 Neb. 362, 60 N. W. 547. But where the suit was for loss of support for four years, a defendant who had only been in business for the last nine months of the period was held not jointly liable for the whole damage but only for the period he was in business. *Stahnka v. Kretle*, 66 Neb. 829, 92 N. W. 1042. The word "beer" denotes an intoxicating liquor within the meaning of the statute. *Kerkow v. Bauer*, 15 Neb. 150.

New Hampshire. "If the husband, wife, parent, child, brother, sister, or other near relative, guardian, or employer of any person who has the habit of drinking spirituous liquors to excess, shall give notice in writing, by him or her signed, [*298] to any *person not to furnish any spirituous liquor to the person who has such habit; if the person so notified shall furnish any spirituous liquor, for a consideration or otherwise, to the person who has such habit, at any time within one year after such notice given, the person giving such notice may, in an action of tort brought by him or her, recover of the person so notified any sum not less than fifty dollars nor more than five hundred dollars, which may be assessed by the jury as damages; and any married woman may bring such action in her own name, and recover such damages to her own use.⁴

"Whenever any person in a state of intoxication shall commit any injury upon the person or property of any other individual, any person, who by himself, his clerk or servant, shall have unlawfully sold or furnished any part of the liquor causing such intoxication, shall be liable to the party injured for all damage occasioned by the injury so done, to be recovered in the same form of action as such intoxicated person would be liable to, and both such parties may be joined in the same action; and in case of the death or disability of any person, either from the injury received as herein specified, or in consequence of intoxication, from the use of liquor unlawfully furnished as aforesaid, any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent, may recover from the person unlawfully selling or furnishing any such liquor as aforesaid, all damage or loss sustained in consequence of such injury, to be recovered in an action on the case; and any married woman may bring such action in her own name, and recover such damages to her own use."⁵

Under the act of 1870, above given, trespass for assault and battery was maintained against four persons jointly, who sepa-

4—Rev. Stat., 1867, p. 210, § 22. 5—Laws of 1870, p. 403.

ately sold liquors in violation of law to the party committing the assault.⁶ The act does not give to one upon whom a person becomes dependent in consequence of intoxication produced by liquor unlawfully furnished, and who was not previously dependent on such party, a right of action against the person so unlawfully furnishing the liquor for the damages resulting from such intoxication.⁷ That portion of the act which gives a remedy *where death resulted is constitutional, and for [*299] the death of the husband his widow, who was dependent upon him for her support, may bring suit.⁸ Where the plaintiff's wife was killed by a person made intoxicated by the defendant, the latter was held liable.⁹

New York. "Every husband, wife, child, parent, guardian, employer or other person who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, against any person or persons who shall, by selling or giving away intoxicating liquors, cause the intoxication, in whole or in part, of such person or persons, and any person or persons owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable, severally or jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained and for exemplary damages; and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parent, guardian or next friend, as the court shall direct; and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises."¹⁰

This act is constitutional, and applies as well to those who sell

6—*Bodge v. Hughes*, 53 N. H. 614. wife was dependent. *Squires v. Young*, 58 N. H. 192.

7—*Hollis v. Davis*, 56 N. H. 74.

9—*Fortier v. Moore*, 67 N. H.

8—*Bedore v. Newton*, 54 N. H.

460, 36 Atl. 369.

117. The husband may be "such injured person" upon whom the

10—*Laws*, 1873, Ch. 646, § 1.

with license as those who sell without it.¹¹ The act creates a new cause of action, but is not penal in its nature.¹² As to what makes out a cause of action under it, see cases cited in the margin.¹³ It is no defense that the liquor was sold by defendant's bar-tender *without his knowledge and against his instructions.¹⁴ When the owner of the building is sued, there must be clear and satisfactory proof establishing the permission to occupy with knowledge that liquors were to be sold therein.¹⁵ An action can be sustained under it for the death of the intoxicated person, if the death was a result naturally following and attributable to the intoxication.¹⁶ It is enough, in any case, if the defendant sold liquor which contributed to the intoxication.¹⁷ Where liquors were bought of the defendants by one person and were drunk by him and another, and the plaintiff was injured by rea-

11—*Baker v. Pope*, 2 Hun, 556; *Quain v. Russell*, 12 Hun, 376. The plaintiff must show some damage to means of support, but both direct and consequential damages are recoverable. *Volans v. Owens*, 74 N. Y. 526. The damage need not be the natural, reasonable, or probable consequence of the sale. It is enough that while intoxicated, acts, though criminal, were done by which plaintiff's means of support have been affected. *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89. So, when a man, while drunk killed another, and was sent to prison, the wife was allowed to recover from the seller. *Beers v. Walhizer*, 43 Hun, 254. In its application to owners of premises the act is constitutional. *Bertholf v. O'Reilley*, 74 N. Y. 509, 30 Am. Rep. 323; *Franklin v. Schermerhorn*, 8 Hun, 112.

12—*Quinlan v. Welch*, 141 N. Y. 158, 36 N. E. 12.

13—*Quain v. Russell*, 8 Hun, 319; *S. C.* 12 Hun, 376; *Bertholf v. O'Reilley*, 8 Hun, 16; 74 N. Y.

500; and cases in preceding note.

14—*Smith v. Reynolds*, 8 Hun, 128. See *Kreiter v. Nichols*, 28 Mich. 496.

15—*Mead v. Stratton*, 8 Hun, 148; 87 N. Y. 493, where a married woman was held liable though her husband kept the bar, she knowing the business was carried on. The owner and the tenant may be joined in the suit. *Bertholf v. O'Reilley*, 8 Hun, 16; *Jackson v. Brookins*, 5 Hun, 530.

16—*Mead v. Stratton*, 87 N. Y. 493; *Reid v. Terwilliger*, 116 N. Y. 530, 22 N. E. 1091; *Quinlan v. Welch*, 141 N. Y. 158, 36 N. E. 12; *McCarty v. Wells*, 51 Hun, 171, 4 N. Y. S. 672; *DePuy v. Cook*, 90 Hun, 43, 35 N. Y. S. 632; *Lawson v. Eggleston*, 28 App. Div. 52, 52 N. Y. S. 181. In the last case the person whose death was counted on killed himself while intoxicated. See *Jackson v. Brookins*, 5 Hun, 530.

17—*Lawson v. Eggleston*, 28 App. Div. 52, 52 N. Y. S. 181.

son of the intoxication of such other person thereby produced, it was held that the defendants would be liable if they knew or had reason to believe that the liquor was procured for the use of such person or for any third party, otherwise not.¹⁸ A steamboat is not a "building or premises," within the statute making the owner or lessor liable.¹⁹ In providing for exemplary damages the statute does not mean that they are to be given in all cases, but only under the same conditions as in other actions.²⁰ A joint action will not lie against two or more persons who separately, at different times and places, have sold liquor to the same person, though the several sales contributed to the intoxication which produced the injury.²¹

18—*Dudley v. Parker*, 55 Hun, 29, 8 N. Y. S. 600.

19—*Rouse v. Catskill, &c., Steamboat Co.*, 59 Hun, 80, 13 N. Y. S. 126.

20—*Reid v. Terwilliger*, 116 N. Y. 530, 22 N. E. 1091.

21—*Jackson v. Brookins*, 5 Hun, 530; *Morenus v. Crawford*, 15 Hun, 45. But see *Comstock v. Hopkins*, 61 Hun, 189, 15 N. Y. S. 908. In *Hayes v. Phelan*, 4 Hun, 773, it is said that the statute should receive a strict construction, and that a right of action only exists against the vendors, &c., of the liquor when it also lies against the intoxicated person. But this is denied in *Quain v. Russell*, 8 Hun, 319. Whether a knowledge of the habits of the husband would warrant the giving of exemplary damages, *quere*. *Dubois v. Miller*, 5 Hun, 332. To hold the owner of the building for exemplary damages, there must be bad motive, or proof of aggravating circumstances with which he is connected. *Rawlins v. Vidvard*, 34 Hun, 205; *Ketcham v. Fox*, 52 Hun, 284, 5 N. Y. S. 272; *Reid v. Terwilliger*, 116 N. Y. 530, 22 N.

E. 1091. The landlord is not liable at all unless he knew at the time of the lease that the premises were to be used for the liquor traffic. *O'Rourke v. Piatt*, 67 Hun, 71, 21 N. Y. S. 1118. Fact of selling without a license for a long time may be shown as affecting such damages. *Neu v. McKechnie*, 95 N. Y. 637, 47 Am. Rep. 89. In *Franklin v. Schermerhorn*, 8 Hun, 112, it is held that as each member of the family may sue, one who sues alone can only recover his proportion of the injury. The wife cannot sue if intoxication is produced by liquor procured and furnished by her. *Elliott v. Barry*, 34 Hun, 129. No action will lie at suit of the father in case of incapacitating of adult son unless he shows that he has been obliged to support the son and so has been injured in his means of support, or that he has lost a support afforded him by the son. *Stevens v. Cheney*, 36 Hun, 1. No action will lie in N. Y. for damage done in Vt. by reason of intoxication produced by liquor sold in N. Y. *Goodwin v. Young*, 34 Hun, 252.

North Carolina. "The father, or if he be dead, the mother, guardian or employer of any minor to whom sale or gifts shall be made in violation of this act, shall have a right of action in a civil suit against the person or persons so offending by such sales or gifts; and upon proof of any such illicit sales or gifts, shall recover from such party or parties so offending [*301] such *exemplary damages as a jury may assess: *Provided*, such assessment shall be not less than twenty-five dollars."22

Ohio. "That every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, such wife, child, parent, guardian, employer or other person shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and the owner of, lessee or person or persons renting or leasing any building or premises, having knowledge that intoxicating liquors are to be sold therein in violation of law, or having leased the same for other purposes, shall knowingly permit intoxicating liquors to be sold in such building or premises that have caused the intoxication, in whole or in part, of such person or persons, shall be liable severally or jointly, with the person or persons selling or giving intoxicating liquors as aforesaid, for all damages sustained, as well as exemplary damages; and a married woman shall have the same right to bring suits and control the same, and the amount recovered, as a *femme sole*; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parent, guardian or next friend, as the court shall direct; and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon premises where such unlawful sale or giving away shall take place; and all

22—Laws of 1873-74, p. 94, § 2.

suits for damages under this act shall be by a civil action in any of the courts of this State having jurisdiction thereof: *Provided*, that such husband, wife, child, parent, guardian or other interested person liable to be so injured by any sale of intoxicating liquors to any person or persons aforesaid, shall desire to prevent the sale of intoxicating liquors to the same, shall give notice either in writing or verbally, before a witness or witnesses, to the person or persons so selling or giving the intoxicating liquors, or to the owner or lessor of the premises wherein such intoxicating liquors are given or sold, or shall file with the township or corporation clerk in the township, village or city wherein such intoxicating liquor may be sold, notice to all liquor-dealers not to sell to such person or persons any intoxicating liquors from and after ten days from the date of so filing such notice; and such notice or notices filed with such clerk shall be entered by the clerk of such township, city, or village in a book to be kept for such purpose, which said book shall be open for the inspection of all persons interested; any notice entered in such book shall be erased and so obliterated as not to be legible by the officer having charge of the same, upon the demand of the person or persons by whom such notice was filed, and thereafter such notice shall cease and end; otherwise, the aforesaid injured person or persons shall not be entitled to real or exemplary damages for the alleged injuries which they may have sustained by the intoxication of any of the aforesaid persons, viz.: husband, wife, child, parent, guardian, employer, or any other person or persons, whomsoever: *Provided*, that such notice, whether served personally or filed with the clerk, as aforesaid, shall during its existence inure to the benefit of all persons interested, the same as if a notice had been served by each."²³

The cause of action under this statute is in the nature of a

23—Laws of 1875, p. 35. This is an amendment of Laws of 1854, p. 154, § 7, which was once before amended, Laws of 1870, p. 102. The section as here given is very blind in some parts, and pains have been taken to give the exact punctuation as officially printed. The decisions here referred to were made under the law as it stood before the amendment, but in the particulars touched upon the change is not material.

tort.²⁴ One who contributes to the intoxication is presumed to have intended it, and is liable for the damages resulting, though others may by their illegal sales have contributed thereto, without his knowledge and without preconcert with him.²⁵ [*303] The wife may bring the action after the decease of *the husband,²⁶ and may recover exemplary damages where the right to recover actual damages is established, and without proof of malice or other circumstances of special aggravation.²⁷ A sale of the wife's property by her husband is an injury to her property.²⁸

It has been recently decided, on full deliberation, that the statute only applies where the sales which caused the injury were illegal and forbidden.²⁹ In a suit against the owner of the premises on a judgment against the tenant, the judgment was held to be conclusive that the defendant therein sold the liquor, that

24—*Reugler v. Lilly*, 26 Ohio St. 48. It need not be proved beyond a reasonable doubt. *Lyon v. Fleahman*, 34 Ohio St. 151.

25—*Boyd v. Watt*, 27 Ohio St. 259; *Sibila v. Bahney*, 34 Ohio St. 399. Sales to an habitual drunkard with knowledge of his habit which contribute to keep it up, render the sellers jointly liable to the wife, although the sellers were in no way connected in business. *Rantz v. Barns*, 40 Ohio St. 43. One may be liable for sales to another though a third person pays for the liquor. *Sibila v. Bahney*, 34 Ohio St. 399. For cases in which proceedings were taken to divest a tenant of possession of leased premises, for violation of this act by selling liquor thereon, see *McGarvey v. Puckett*, 27 Ohio St. 669; *Justice v. Lowe*, 26 Ohio St. 372.

26—*Schneider v. Hosier*, 21 Ohio St. 98.

27—*Schneider v. Hosier*, 21 Ohio St. 98. An injury to means of support is ground for the action though habitual drunkenness is not proved. *Sibila v. Bahney*, 34 Ohio St. 399. As to what constitutes an injury to means of support, see this case, and also *Mulford v. Clewell*, 21 Ohio St. 191. As to what constitutes an injury to the person, see also this last case. For the death of the person intoxicated no recovery can be had. *Kirchner v. Myers*, 35 Ohio St. 85.

28—*Mulford v. Clewell*, 21 Ohio St. 191.

29—*Baker v. Beckwith*, 29 Ohio St. 314. The decision merely construes the statute; and it could afford little or no light for the construction of the statutes of other States. Some of the other statutes certainly give this redress where the sales themselves are not forbidden.

the sales were unlawful and that the plaintiff sustained damages to the amount of the judgment.³⁰

Pennsylvania. "The husband, wife, parent, child or guardian of any person who has or may hereafter have the habit of drinking intoxicating liquor to excess, may give notice in writing, signed by him or her, to any person, not to sell or deliver intoxicating liquor to the person having such habit; if the person so notified, at any time within twelve months after such notice, sells or delivers any such liquor to the person having such habit, the person giving the notice may, in an action of tort, recover of the person notified any sum not less than fifty nor more than five hundred dollars, as may be assessed by the court or judge as damages. A married woman may bring such action in her own name, notwithstanding her coverture, and all damages recovered by her shall go to her separate use. In case of the death of either party, the action and right of action given by this section shall survive to or against his executor or administrator without limit as to damages."³¹

"Any person furnishing intoxicating drinks to any other person, in violation of any existing law, or of the provision of this act, shall be held civilly responsible for any injury to person or property in consequence of such furnishing; and any one aggrieved may recover full damages against such person so furnishing, by action on the case, instituted in any court having jurisdiction of such form of action, in this commonwealth."³²

Where the plaintiff's husband became intoxicated from liquor furnished by defendant and because of such intoxication killed a

30—*Goodman v. Hailes*, 59 Ohio St. 342, 52 N. E. 829. The owner in such case may deny that the premises were leased for saloon purposes, or that such use was permitted by him, or that the liquor which caused the intoxication was sold upon the premises and in case of such denial the burden will be on the plaintiff to establish these points. *Ibid.* The following additional cases

under the statute are referred to. *Miller v. Gleason*, 18 Ohio C. C. 374; *Kolling v. Bennett*, 18 Ohio C. C. 425.

31—*Laws of 1875*, p. 41, § 7.

32—*Act May 8, 1854*, § 3. This act also made it a penal offense to furnish intoxicating drinks to one of known intemperate habits or to one when drunk or intoxicated.

man and was incarcerated therefor, it was held that the plaintiff was not injured in her person or property within the act of 1854.³³ Under the same statute a father cannot recover for expenses and loss of time in caring for his adult son, who is not a member of his family nor in his employ, and who was made drunk by liquor furnished by the defendant.³⁴ An act of 1851 gave an action to the widow or personal representatives for the death of a person caused by "unlawful violence or negligence." Furnishing liquor to one of known intemperate habits, in violation of the act of 1854, is "unlawful negligence" within the act of 1851, and if such liquor produces intoxication and such intoxication is the proximate cause of death, an action for such death lies under the act of 1851.³⁵

Rhode Island. "If any person in a state of intoxication commits any injury to the person or property of another, the person who furnished him with any part of the liquor which [*304] occasioned *his intoxication, if the same was furnished in violation of this act, shall be liable to the same action by the party injured as the person intoxicated would be liable to; and the party injured or his or her legal representatives, may bring either a joint action against the person intoxicated and the person who furnished the liquor, or a separate action against either."

"The husband, wife, parent, child, guardian or employer of any person who has or may hereafter have the habit of drinking intoxicating liquor to excess, may give notice in writing, signed by him or her, to any person requesting him not to sell or deliver spirituous or intoxicating liquor to the person having such habit. If the person so notified at any time within twelve months thereafter, sells or delivers any such liquor to the person having such habit, or permits such person to loiter on his premises, the person giving the notice may in an action of trespass on the case, recover

33—Bradford v. Boley, 167 Pa. 95; Davies v. McKnight, 146 Pa. St. 506, 31 Atl. 751. St. 610, 23 Atl. 320; Roach v. Kelly,

34—Veon v. Creator, 138 Pa. St. 194 Pa. St. 24, 44 Atl. 1090, 75 48, 20 Atl. 865, 9 L. R. A. 814. Am. St. Rep. 685.

35—Fink v. Gorman, 40 Pa. St.

of the person notified, such sum as may be assessed as damages: *Provided*, the employer giving said notice shall be injured in his person, business or property. A married woman may bring such action in her own name, and all damages recovered by her, shall inure to her separate use. In case of the death of either party, the action and right of action shall survive to or against his executor or administrator.”³⁶

South Dakota. By section 2839 of the Political Code of 1903 every person engaging in the sale of any spirituous, malt, brewed, fermented or vinous liquors is required, before commencing such business and on or before the first day of July of each and every year thereafter, to execute a bond to the State of South Dakota in the sum of two thousand dollars, with sureties to be approved by the board of county commissioners of the county in which such business is proposed to be carried on, conditioned “that he will not directly or indirectly by himself, his clerk, agent or servant at any time furnish, sell or give or deliver any spirituous, malt, brewed, fermented or vinous liquors, or any mixed liquors, or any mixture or compound any part of which is spirituous, malt, brewed, fermented or vinous liquors to a minor or to any adult person whatever who is at the time intoxicated, nor to any person in the habit of getting intoxicated, when notified in writing that such person is in the habit of getting intoxicated nor to any person when forbidden in writing to do so by the husband, wife, parent, child, guardian or employer of such person, or by the supervisor of the township, mayor of the city or president or a trustee of any town or member of the board of county commissioners of the county in which such person shall reside or temporarily remain, that he shall also pay all damages, actual and exemplary, that may be adjudged to any person or persons for injuries inflicted upon him or them either in person or property or means of support or otherwise by reason of his selling, furnishing, giving or delivering any such liquor.” Section 2844 of the same Code is in part as follows: “It shall not be lawful for any person to sell, furnish or give away any spirituous, malt, brewed, fermented or vinous liquors to any minor or to any in-

toxicated person; and it shall not be lawful for any person to sell, furnish or give away any spirituous, malt, brewed, fermented or vinous liquors to any person in the habit of getting intoxicated when notified in writing by any person or persons that such person is in the habit of getting intoxicated; nor to any person when forbidden in writing so to do by the husband, wife, parent, child, guardian or employer of such person, or the supervisor of the township, or the president or a trustee of a town, mayor of a city, the board of county commissioners of the county where such person shall reside or temporarily remain. The fact of selling, giving or furnishing any liquor in any place where intoxicating liquors are sold or kept for sale, to any minor, or to any intoxicated person, or to any person in the habit of getting intoxicated, or to any person when forbidden in writing so to do by the husband, wife, parent, child, guardian or employer of such person, or by the supervisor of the township, or the president or the trustee of the town, mayor of the city, or board of county commissioners of the county where such person shall reside or temporarily remain, shall be prima facie evidence of an intent on the part of the person so selling, giving or furnishing such liquor to violate the law."

"§ 2849. The damages in all cases, arising under this article, together with the costs of suit, shall be recovered in an action before any court of competent jurisdiction; and in any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but the commencement of suit and recovery by one of said parties shall be a bar to the suit brought by the other. And it shall be lawful for any married woman or any other person at her request to institute and maintain in her own name a suit, on any such bond mentioned in this article for all damages sustained by her or by her children on account of such traffic; and the money when collected shall be paid over for the use of herself and children. On the trial of any suit under the provisions of this article the cause and foundation whereof shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defend-

ants sold or gave away the liquors to the person so intoxicated or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries were received; and in an action for damages brought by a married woman or other person whose support legally devolves upon a person disqualified from intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification.”³⁷

The saloonkeeper is bound to ascertain and to know that the person to whom he sells intoxicating liquors is not a minor, is not intoxicated, and is not in the habit of getting intoxicated; and as to such persons no notice is required, forbidding him to make such sales. “The lawmaking power,” says the court, “evidently intended to make it absolutely unlawful to sell intoxicating liquors to any of the three classes of persons mentioned in section 11, and it also evidently intended to require of the saloonkeeper to ascertain at his peril whether or not the person to whom he was selling came within either of these classes.”³⁸ The wife may recover for loss of support by reason of the husband’s death, where death results from the intoxication.³⁹ After the right of action has accrued to the wife it is not affected by a divorce subsequently obtained.⁴⁰

Tennessee. “Section 1. That it shall be unlawful for any person engaged regularly, or otherwise, in the manufacture or sale of any spirituous, vinous, malt, or mixed liquors, their employes, agents or servants, or any person for them, to sell, give, furnish to or procure for any husband who is an habitual drunkard any intoxicating liquors, after having been served with a written prohibitory notice thereof, signed by the wife of said husband.

37—The sections of the code referred to were formerly sections 6, 11 and 16, respectively, of chapter 72 of the acts of 1897.

38—*Sandidge v. Widmann*, 12 S. D. 101, 80 N. W. 164.

39—*Stafford v. Levinger*, 16 S.

D. 118, 91 N. W. 462, 102 Am. St. Rep. 686; *Garrigan v. Thompson*, 17 S. D. 132. See *Paulson v. Langness*, 16 S. D. 471, 93 N. W. 655.

40—*Nerdin v. Kjos*, 13 S. D. 497, 83 N. W. 573.

“Section 2. That said notice shall be served and a due return thereof made to the clerk of the County Court by the sheriff or any constable of the county wherein such person is engaged in the manufacture or sale of said liquors.

“Section 3. That any person or persons violating the provisions of the first section of this act shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than \$10 nor more than \$200.”⁴¹

It has been held that a breach of the statute is actionable negligence and that a wife could maintain an action for damages for the death of her husband caused by liquor furnished by the defendants.⁴²

Texas. “Any person, firm or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, shall, before engaging in such occupation, be required to enter into bond in the sum of four thousand dollars, with at least two good, lawful and sufficient sureties, payable to the State of Texas, to be approved by the county judge, conditioned that said person, firm or association of persons so selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in quantities less than a quart, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication; and that he or they will not sell or permit to be sold in his or their house or place of business, nor give, nor permit to be given, any spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing through the sheriff or other peace officer, by the wife, mother, daughter or sister of the person, not to sell to such person; and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; * * * which said bond

41—Act March 16, 1889.

Tenn. 220, 36 S. W. 1097, 35 L. R.

42—Riden v. Grimm Bros., 97 A. 587.

may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such person shall be entitled to recover the sum of five hundred dollars as liquidated damages for each infraction of the conditions of such bond, and the said bond shall not be void on the first recovery, but may be sued on until the full penal sum named therein shall have been recovered."⁴³

The act is valid⁴⁴ and is penal in its nature⁴⁵ and the action abates on the death of the principal in the bond.⁴⁶ A wife, who has given the notice required by the statute, may sue alone for sales to her husband.⁴⁷ It may be shown in defense that, after such notice, the wife consented to such sales.⁴⁸ A minor does not "enter and remain" so as to create a breach of the bond who merely buys a drink and goes out.⁴⁹

Vermont. "Whenever any person, by reason of intoxication, shall commit or cause any injury upon the person or property of any other individual, any person who by himself, his clerk, or servant, shall have unlawfully sold or furnished any part of the liquor causing such intoxication, shall be liable to the party injured for all damage occasioned by the injury so done, to be recovered in the same form of action as such intoxicated person would be liable to; and both such parties may be joined in the same action, and in case of the death or disability of any person, either from the injury received as herein specified, or in consequence of intoxication from the use of liquors unlawfully furnished as aforesaid, any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent, may

43—Acts 1887, p. 58, Sec. 4. *nison*, 21 Tex. Civ. App. 332, 50 S. Batts' Annotated Civil Stats. of W. 1028.
Texas, Vol. 2, p. 508, Article 3380.

44—*Peavy v. Goss*, 90 Tex. 89, 37 47—*Wright v. Tipton*, 92 Tex. 168, 46 S. W. 629.

45—*Johnson v. Rolls*, 97 Tex. 48—*Tipton v. Thompson*, 21 Tex. Civ. App. 143, 50 S. W. 641.

46—*Johnson v. Rolls*, 97 Tex. 453, 79 S. W. 513. 49—*Tinkle v. Sweeney*, 97 Tex. 190, 77 S. W. 609. But see *Qualls*

47—*Johnson v. Rolls*, 97 Tex. 453, 79 S. W. 513; *State v. Schuenemann*, 18 Tex. Civ. App. 45 S. W. 839. See generally *Peavy v. Goss*, 90 Tex. 89, 37 S. W. 317; *Nolan v. Ten-*

recover from the person unlawfully selling or furnishing any such liquor as aforesaid, all damage or loss sustained [*305] *in consequence of such injury, in any court having jurisdiction in such cases; and coverture or infancy shall be no bar to proceedings for recovery in any case arising under this act, and no person shall be disqualified as a witness, by reason of the marriage relation in any proceeding under this act.’⁵⁰

Washington. “Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person; and any person, or persons owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors, shall, if any such liquors sold or given therein have caused, in whole or in part, the intoxication of any person, be liable, severally or jointly, with the persons selling or giving the intoxicating liquors as aforesaid, for all damages sustained, and the same may be recovered in a civil action, in any court of competent jurisdiction. A married woman may bring such action in her own name, and all damages recovered by her shall enure to her separate use; and all damages recovered by a minor under this chapter shall be paid either to such minor, or to such person in trust for him, and on such terms as the court may direct. In case of the death of either party,

Green v. Southard, 94 Tex. 470, 61 S. W. 705.

50—Act of 1869, as amended in 1874; Laws 1874, p. 53. The dependency must be legal. No action arises to a woman unlawfully living as a wife and to an illegiti-

mate child. *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799. An inn keeper who has furnished the liquor cannot recover for the drunken man’s trespass. *Aldrich v. Harvey*, 50 Vt. 162, 28 Am. Rep. 501.

the action and right of action to or against his executor or administrator shall survive.’⁵¹

West Virginia. “Any husband, wife, child, parent or guardian may serve upon any person engaged in the sale of intoxicating liquors a written notice not to sell or furnish such liquors to the wife, husband, child, parent or ward of the person giving such notice; and thereafter, if the person so served with such notice shall, by himself or another, sell or furnish such liquors to the person named in said notice, and by reason thereof the person to whom such liquor is sold or furnished shall become intoxicated, and, while in that condition, do damage to another, or shall, by reason of such intoxication, injure any person in his or her means of support who may have the legal right to look to him therefor, upon due proof that such liquors were sold or furnished as aforesaid, and that the person mentioned in said notice was, at the time of service thereof, in the habit of drinking to intoxication, an action may be maintained by the husband, wife, child, parent or guardian of the person mentioned in said notice, or other person injured by him as aforesaid, against the person selling or furnishing him such liquors, as well as for all such damages as the plaintiff has sustained by reason of the selling or giving of such liquors, as for exemplary damages, and if the person so proceeded against has given the bond and security hereinafter provided for, such suit may be brought and prosecuted upon such bond, against him and his sureties therein. Such suit may be brought and prosecuted by a married woman in any case where the person mentioned in such notice is her husband or infant child, and the damages recovered therein shall be her sole and separate property, and governed by the provisions of the code of West Virginia in relation to the separate property of married women. Where such suit is brought by *a [*306] guardian, the damages recovered therein shall be the property of his ward.’⁵²

51—Code 1881, § 2059. Widow and children cannot join in suit for death of husband and father by intoxication. The first “severally or jointly” in the section refers to the defendants. *Delfel v.*

Hanson, 2 Wash. 194, 26 Pac. 220. As to who is entitled to benefit of statute see *Judson v. Parry*, 38 Wash. 37, 80 Pac. 194.

52—Laws of 1877, p. 144, § 16. Damages for death caused by in-

Wisconsin. "Any person or persons, who shall be injured in person, property or means of support by or in consequence of the intoxication of any minor or habitual drunkard, shall have a right of action severally or jointly in his, her or their name against any person or persons who have been notified or requested in writing by the authorities designated in section 10 of this act, the husband, wife, parents, relatives, guardians or persons having the care or custody of such minor or habitual drunkard, not to part with liquor or other intoxicating drinks to them, and who, notwithstanding such notice and request, or shall knowingly sell or give away intoxicating liquors, thereby causing the intoxication of such minor or drunkard, and shall be liable for all damages resulting therefrom. A married woman shall have the same right to bring suit and to control the same as a *femme sole*, and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parents, guardian or next friend, as the court shall direct, and all suits for damages may be by any appropriate action in any of the courts of this State, having competent jurisdiction."

"The giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, shall be deemed and held to be an unlawful selling within the provisions of this act."⁵³

This legislation is constitutional.⁵⁴ The wife who takes care of an intoxicated person may recover compensation therefor under the statute;⁵⁵ and if she is injured in her health in so doing, and put to the expense of a physician and attendant for him, and of a physician for herself, and is obliged to employ assistance in her own business in consequence of her attendance upon her husband, these constitute elements of damage under the act.⁵⁶ Driving the wife from the house by threats

toxication may be recovered under the statute. *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, which see as to when exemplary damages may be given.

53—Laws of 1874, p. 303, § 16 and 20.

54—*State v. Ludington*, 33 Wis.

107; *Wightman v. Devere*, 33 Wis. 570. These were decisions under a previous statute, but are applicable to this.

55—*Wightman v. Devere*, 33 Wis. 570.

56—*Wightman v. Devere*, 33 Wis. 570. What should constitute

*and intimidation, but without actual violence, is such [*307] physical injury as she may recover for, and damages may be added for the injury to her feelings and the indignity suffered by her.⁵⁷ Means of support will include what the husband might have earned by his labor and attention to business, and contributed to the support of the family.⁵⁸ It is immaterial whether the sale was made by defendant in person or by a servant.⁵⁹

ACTIONS FOR CAUSING DEATH BY WRONGFUL ACT, ETC.

It has heretofore been stated, that at the common law, no civil action would lie for causing the death of a human being.⁶⁰ By this was not meant that the act which caused the death might not, under some circumstances, give a right of action, but that it must be a right not springing from the death itself. Thus it has been shown that the master of a servant, or any one who is lawfully entitled to command the services of another, may bring action against a wrong-doer who deprives him of those services. Now, the same act which deprives a master of the services of

exemplary damages was somewhat discussed in this case, and also whether the wife could recover for loss of means of support if the husband did not support her before.

57—*Peterson v. Knoble*, 35 Wis. 80.

58—*Wightman v. Devere*, 33 Wis. 570.

59—*Peterson v. Knoble*, 35 Wis. 80. For questions arising out of the repeal of the statute under which the foregoing decisions were made, see *Dillon v. Linder*, 36 Wis. 344.

60—*Ante* p. *16; see *Hindry v. Holt*, 24 Colo. 464, 51 Pac. 1002, 65 Am. St. Rep. 235, 39 L. R. A. 351; *Broughel v. South New Eng. Tel. Co.*, 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404; *Nixon v. Ludlam*, 50 Ill. App. 273; *Jackson v. Pitts-*

burgh, &c., Ry. Co., 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192; *Major v. Burlington, &c., Ry. Co.*, 115 Ill. 309; *Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113; *Nickerson v. Harriman*, 28 Me. 279; *Bligh v. Biddeford, &c., R. R. Co.*, 94 Me. 499, 48 Atl. 112; *Grosso v. Delaware, &c., R. R. Co.*, 50 N. J. L. 317, 13 Atl. 233; *Myers v. Holborn*, 58 N. J. L. 193, 33 Atl. 389, 55 Am. St. Rep. 606, 30 L. R. A. 345; *Ohnmacht v. Mount Morris Elec. Lt. Co.*, 66 App. Div. 482, 73 N. Y. S. 296; *Killian v. Southern Ry. Co.*, 128 N. C. 261, 38 S. E. 873; *Gulf, &c., Ry. Co. v. Beall*, 91 Tex. 310, 42 S. W. 1054, 66 Am. St. Rep. 892, 41 L. R. A. 807; *Seney v. Chicago, &c., Ry. Co.*, 125 Ia. 290, 101 N. W. 76; *Swift & Co. v. Johnson*, 138 Fed. 867 (C. C. A.).

his laborer, or a father of those of his child, may result in the death of the servant or child. In these cases the common law gave a remedy for the loss, but only for the time intermediate the injury and the death. The master, parent, etc., suing might, however, recover any incidental damages he might have suffered, such as expenses for medical attendance, care and nursing up to that time; but the estimate must be confined to the pecuniary loss, and not cover mental suffering.⁶¹ And it has been held, in England, that where a passenger is being carried by a railway company, and is killed through a breach of the implied obligation of the company to convey carefully, his personal representa-

tive may maintain an action for the damage to his personal *estate arising in his life time from medical expenses and loss occasioned by his inability to attend to business.⁶² But such redress is exceedingly inadequate in any case, and where the death is instantaneous, as well as in very many other cases, the principles which have supported recovery in the cases above mentioned can have no application and no redress at all was possible at common law. This was a great and an admitted defect, and the British Parliament undertook to remedy it in the year 1846 by an act which is familiarly known as Lord Campbell's Act, and which has formed the model for much of the legislation in this country on the same subject.

It was provided by this important statute "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

61—*Osborn v. Gillett*, L. R. 8 Centr. R. R. Co., 73 Ga. 520; *Sullivan v. Adams*, 16 Mich. 180; *Covington, & Co. v. Packer*, 9 Bush, 455; *Sherman v. Johnson*, 58 Vt. 40; *Bell v. R. Co.*, L. R. 10 C. P., 189 (1875).

62—*Bradshaw v. Lancashire, & Co.*

"That every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury, by their verdict, shall direct."⁶³

*It is seen, on a perusal of this statute, that it gives an [*309] action only when the deceased himself, if the injury had not resulted in his death, might have maintained one. In other words, it continues for the benefit of the wife, husband, etc., a right of action which, at the common law, would have terminated at the death, and enlarges its scope to embrace the injury resulting from the death.⁶⁴ The act is held not to give a new right of

63—Stat. 9 and 10 Vic. c. 93, §§ 1 and 2. The third section provided that only one action should lie for and in respect of the same subject matter of complaint; and it limited the time for bringing this to twelve calendar months from the death. The fifth provided that the word "person" should apply to bodies politic and corporate, that the word "parent" should include father and mother, grandfather and grandmother, and stepfather and stepmother; and the word "child" should include son and daughter, grandson and granddaughter, and stepson and stepdaughter. By Stat. 27 and 28 Vic. c. 95, if there is no executor or administrator, the action may be brought by any of the persons for whom an executor or administrator might have brought it.

64—Read v. Great Eastern R.

Co., L. R. 3 Q. B. 555; Senior v. Ward, 1 El. & El. 385; McCubbin v. Hastings, 27 La. Ann. 713; Conner's Admr. v. Paul, 12 Bush, 144. In Louisiana the widow and heirs can only recover as the deceased might have recovered. They cannot recover for the loss caused by his death. Vredenburg v. Behan, 33 La. Ann. 627. So in N. H., but recovery may be had for the mental suffering of the decedent, as well as the physical. Corliss v. Worcester & Co., R. R., 63 N. H. 404. In R. I. no action can be maintained except for an injury for which the deceased, had he survived, could have sued. No recovery can be had for the benefit of the husband where the wife was detained away from him and he was so slandered to her that she died. Neilson v. Brown, 13 R. I. 651, 43 Am. Rep. 58. In Illi-

action but a right to recover a new class of damages, which depends on the same right as was in the deceased.⁶⁵ If, therefore, the party injured had compromised for the injury, and accepted satisfaction previous to the death, there could have been no further right of action, and consequently no suit under the statute.⁶⁶ It is a logical conclusion, also, that if the negligence of the person killed *contributed proximately to the fatal injury, no action can be maintained on the statute, because he himself could have brought none had the in-

nois if after beginning an action the plaintiff dies as the result of the injury, that action does not survive to his administrator, but the latter may bring another action for the injury, which has caused the death and in this only the pecuniary loss to the estate can be recovered. *Holton v. Daly*, 106 Ill. 131. See, also, *Ind. &c., Co. v. Stout*, 53 Ind. 143. In Ohio it is said the administrator can bring an action for the injury under the same restrictions and on the same grounds that the party injured, if death had not ensued, might have done. *Meara's Admr. v. Holbrook*, 20 Ohio St. 137, 5 Am. Rep. 633. It is held in Kentucky, that where the death is not instantaneous, there are two causes of action, one for mental and bodily suffering before death, and the other for the loss of life; but that only one can be maintained, and that the party entitled to sue must elect between them, and that the pendency of one action would abate the other. *Conner's Admr. v. Paul*, 12 Bush, 144; *Newport News, &c., Co. v. Dentzel*, 91 Ky. 42, 14 S. W. 958. But see *Hackett v. Louisville, &c., R. R. Co.*, 95 Ky. 236, 24 S. W. 871. In Louisville, &c., R. R. Co. *v. McElwain*, 98 Ky.

700, 34 S. W. 236, 56 Am. St. Rep. 385, 34 L. R. A. 788, it is held that a recovery under the statute for the death of the wife for the benefit of the husband bars his common law action to recover for loss of society, service, etc., up to her death. Kentucky now has a new death statute more like the typical form of such statutes. See *Lewis v. Taylor Coal Co.*, 112 Ky. 845, 66 S. W. 1014.

65—*Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016. But in some states the statute is held to create a new cause of action. *Pittsburgh, &c., Ry. Co. v. Hosen*, 152 Ind. 412, 53 N. E. 419; *McKay v. New England Dredging Co.*, 92 Me. 454, 43 Atl. 29; *Cooper v. Shore Elec. Co.*, 63 N. J. L. 558, 44 Atl. 633; *Belding v. Black Hills, &c., R. R. Co.*, 3 S. D. 369, 53 N. W. 750.

66—*Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555. See, also, *Carey v. Berkshire R. R. Co.*, 1 Cush. 479; *Kearney v. Boston, &c., R. R. Co.*, 9 Cush. 108; *Bancroft v. Boston, &c., R. R. Co.*, 11 Allen, 34; *Commonwealth v. Vermont, &c., R. R. Co.*, 108 Mass. 7, 11 Am. Rep. 301; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Littlewood v. Mayor &c.*, 89 N. Y. 24, 42 Am. Rep. 271; *Soule v. New*

jury not proved fatal.⁶⁷ So if the injury was caused by the negligence of a fellow servant, no action will lie under the statute against the master, unless the statute, by construction, appears to give it in such case.⁶⁸ A question has also been made in some States whether suit could be maintained where the death was instantaneous; and in Massachusetts, under a somewhat nice and technical construction of the statute, it was decided that the action would not lie in such a case.⁶⁹ But probably under no

York, &c., R. R. Co., 24 Conn. 575; *Murphy v. New York, &c., R. R. Co.*, 29 Conn., 496; *Goodsell v. Hartford, &c., R. R. Co.*, 33 Conn. 51; *Hecht v. Ohio, &c., Ry. Co.*, 132 Ind. 507, 52 N. E. 799; *Price v. Richmond, &c., R. R. Co.*, 33 S. C. 556, 12 S. E. 413, 26 Am. St. Rep. 700; *Brown v. Electric Ry. Co.*, 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666; *Thompson v. Ft. Worth, &c., Ry. Co.*, 97 Tex. 590, 80 S. W. 990. Where the deceased commenced a suit before his death which is prosecuted to judgment by his administrator, a satisfaction of the judgment bars a suit for the benefit of the widow and next of kin. *Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016. See *McCafferty v. Pennsylvania R. R. Co.*, 193 Pa. St. 339, 44 Atl. 435, 74 Am. St. Rep. 690.

67—*Senior v. Ward*, 1 El. & El. 385, following *Bartonhill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266, and generally followed in this country. *Cordell v. New York, &c., Co.*, 75 N. Y. 330; *Corcoran v. Boston, &c., Co.*, 133 Mass. 507; *Ind., &c., Co. v. Greene*, 106 Ind. 279. So whether the action is civil or criminal. *State v. Maine Centr. R. R. Co.*, 76 Me. 357, 49 Am. Rep. 622. Under some statutes contributory negligence is no defense, though it may go in mitigation of

damages. See *Nashville, &c., R. R. Co. v. Smith*, 6 Heisk. 174. It is not a defense in Mass. *Merrill v. Eastern R. R.*, 139 Mass. 252, 52 Am. Rep. 705; *Com. v. Boston, &c., R. R. Co.*, 134 Mass. 211. If death results from an affray, the fact that deceased brought it on is no defense. *Darling v. Williams*, 35 Ohio St. 58; *Besenecker v. Sale*, 8 Mo. App. 211.

68—The Iowa statute is held to require that construction. *Philo v. Ill. Cent. R. R. Co.*, 33 Iowa, 47. See *McDonald v. Eagle, &c., Co.*, 68 Ga. 839.

69—The decision was under the statute of 1842, which provided that "the action of trespass on the case for damage to the person shall hereafter survive, so that, in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were living." *Kearney v. Boston, etc., R. Corp.* 9 Cush. 108. Compare *Bancroft v. Boston, &c., R. Corp.* 11 Allen, 34. The rule is still followed in that State. *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214; *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242; *Mulchey v. Washburn, &c., Co.*, 145

existing statute would it be so held now.⁷⁰ In Maine and Michigan it is held that an action lies under the statute *only* where death is instantaneous or immediate.⁷¹ Such statutes are held

Mass. 281, 14 N. E. 106. If one survives a brief time and is conscious, more than nominal damages are recoverable. *Nourse v. Packard*, 138 Mass. 307. Otherwise if unconscious. *Tully v. Fitchburg, &c., Co.*, 134 Mass. 499. In Georgia and South Carolina and New Jersey if the death is instantaneous there can be no recovery for the death of a wife or child. *Womack v. Centr. R. R. &c., Co.*, 80 Ga. 132, 5 S. E. 63; *Edgar v. Castello*, 14 S. C. 20, 37 Am. Rep. 714; *Grosso v. Del. &c., R. R. Co.*, 50 N. J. L. 317, 13 Atl. 233. Under the Tennessee statute a similar ruling was made. *Louisville, &c., R. R. Co. v. Burke*, 6 Coldw. 45; but this was overruled in *Nashville, &c., R. R. Co. v. Prince*, 2 Heisk. 580. And, see, *Fowlkes v. Nashville, &c., R. R. Co.*, 9 Heisk. 829. In Connecticut the court distinguish their statute from that of Massachusetts, and hold the suit maintainable in case of instantaneous death. *Murphy v. New York, &c., R. R. Co.*, 30 Conn. 184. In New York the conclusion is the same. *Brown v. Buffalo, &c., R. R. Co.*, 22 N. Y. 191. So in Texas and Iowa; *Int. &c., Co. v. Kindred*, 57 Tex. 491; *Worden v. Humeston, &c., Co.*, 72 Ia. 201, 33 N. W. 629; *Connors v. Burlington, &c., Co.*, 71 Ia. 490, 32 N. W. 465.

70—The action lies though death instantaneous. *Broughel v. Southern New Eng. Tel. Co.*, 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404; *Perham v. Portland Elec. Co.*, 33 Ore. 451, 53 Pac. 14, 72 Am. St.

Rep. 730, 40 L. R. A. 799; *Reed v. Northwestern R. R. Co.*, 37 S. C. 42, 16 S. E. 289.

71—*Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660; *Conley v. Portland Gas Lt. Co.*, 96 Me. 281, 52 Atl. 656; *Dolson v. Lake Shore, &c., Ry. Co.*, 128 Mich. 444, 87 N. W. 629; *Jones v. McMillan*, 129 Mich. 86, 88 N. W. 206; *Storrie v. Grand Trunk Elevator Co.*, 134 Mich. 297, 96 N. W. 569; *Oliver v. Houghton County St. Ry. Co.*, 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607. In the last case it was held that where the injured person survived, in an unconscious condition until the following day, the remedy was under the act, as to the survival of actions. And in such cases it is held in Michigan that the measure of damages is not limited to the pain and suffering, and loss of earnings until death, but includes loss of earnings during the deceased's expectation of life. *Kyer v. Valley Tel. Co.*, 132 Mich. 281, 93 N. W. 623; *Oliver v. Houghton County St. Ry. Co.*, 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607. The Supreme court of Maine holds that to come within its statute death must be immediate though it need not be instantaneous and defines its meaning as follows: "We do not say that the death must be instantaneous. We have never so held. Very few injuries cause instantaneous death. Instantaneous means done or occurring in an instant, or without any perceptible duration of time; as the passage of electricity appears to be in-

by some courts to be in derogation of the common law and to be strictly construed,⁷² and by others to be remedial and to be liberally construed.⁷³ Perhaps the correct rule may be that such statutes should receive a strict construction in determining the persons or classes of persons who are entitled to their benefit and a liberal construction in applying the statute in their favor.⁷⁴

stantaneous. It is so defined in Webster's International Dictionary. And when we say that the death must be immediate, we do not mean to say that it must follow the injury within a period of time too brief to be perceptible. If an injury severs some of the principal blood vessels, and causes the person injured to bleed to death, we think his death may be regarded as immediate, though not instantaneous. If a blow upon the head produces unconsciousness, and renders the person injured incapable of intelligence, thought or speech or action, and he so remains for several minutes, and then dies, we think his death may very properly be considered as immediate, though not instantaneous. Such a discrimination may be regarded by some as excessively exact,—or nice, and therefore hypercritical. But, in stating legal propositions, it is impossible to be too exact; and while other courts, and some writers of text books, have used indiscriminately the words instantaneous and immediate, and the adverbs instantaneously and immediately, we have not regarded them, in this class of cases, as meaning precisely the same thing, and have preferred to use the words immediate and immediately, as being more comprehensive and

elastic in their meaning, than the words instantaneous and instantaneously, and better calculated to convey the idea which we wish to express." *Sawyer v. Perry*, 88 Me. 42, 47, 48, 33 Atl. 660.

72—*Thornburg v. Am. Strawboard Co.*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334; *McDonald v. Pittsburgh, &c., Ry. Co.*, 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 32 L. R. A. 309; *Louisville, &c., R. R. Co. v. Bean*, 94 Tenn. 388, 29 S. W. 370.

73—*Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352; *Kearney Elec. Lt. Co. v. Laughlin*, 45 Neb. 390, 63 N. W. 941.

74—See *Barrett v. Dolan*, 130 Mass. 366, 30 Am. Rep. 456; *Green v. Hudson R. R. Co.*, 32 Barb. 25; *Warren v. Englehart*, 13 Neb. 283; *Dickins v. N. Y. Cent. R. R. Co.*, 23 N. Y. 159; *Houston, &c., Ry. Co. v. Bradley*, 45 Tex. 171; *Woodward v. Railway Co.*, 23 Wis. 400. Whether there may be two actions when death is not instantaneous, one to recover on behalf of the estate of the deceased, for the pain and suffering and loss of time up to the death, and one to recover on behalf of the beneficiaries named in the statute, for the death itself, see *Davis v. Railway Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; *Broughel v. Southern New Eng. Tel. Co.*, 72 Conn.

[*311] *But there is another class of statutes in the United States quite distinct from Lord Campbell's Act, and which give rights of action irrespective of any that the deceased himself might have had.⁷⁵ By this we mean that they give to some designated beneficiary or beneficiaries a right that only comes into existence after the death, and is not the survival, continuation, or enlargement of any pre-existing right. Thus, a Georgia statute provides that "A widow, or, if no widow, a child or children may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children."⁷⁶ In the main, however, such an action must be supported on the same principles as those which govern the action under Lord Campbell's Act.

Whether Remedy Local. In several States it is held that the remedy is purely local and can only be brought in the State whose statutes give it and where the killing takes place.⁷⁷

617, 45 Atl. 435, 49 L. R. A. 404; *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; *Newport News, &c., Co. v. Dentzel*, 91 Ky. 42, 14 S. W. 958; *Hackett v. Louisville, &c., R. R. Co.*, 95 Ky. 236, 24 S. W. 871; *Louisville, &c., R. R. Co., v. McElwain*, 98 Ky. 700, 34 S. W. 236, 56 Am. St. Rep. 385, 34 L. R. A. 788; *Ranney v. Railroad Co.*, 64 Vt. 277, 24 Atl. 1053; *Hedrick v. Ilwaco Ry. & Nav. Co.*, 4 Wash. 400, 30 Pac. 714.

75—These, however, may provide that the action shall be brought by the executor or administrator, or which is the same thing, by the personal representative. See *Hagen v. Kean*, 3 Dill. 124. A widow cannot sue under this designation. *Ibid.* For a somewhat peculiar statute, see *James v. Christy*, 18 Mo. 162.

76—Code of 1873, p. 511 § 2971. The husband can bring no action under this statute for the homicide of his wife. *Georgia, &c., Co. v. Wynn*, 42 Ga. 331. But a child may for the death of the mother. *Atlanta, &c., R. R. Co. v. Venable*, 65 Ga. 55. Whatever would have defeated the husband's action will defeat the widow's. *Atlanta, &c., R. R. Co. v. Webb*, 61 Ga. 586; *Brery v. Northeastern R. R. Co.*, 72 Ga. 137. In some of the States the proceeding against railroad companies causing death by negligence is by indictment, and a fine is imposed on conviction; but it is for the benefit of the widow, children, or heirs and the principles applicable in civil cases apply. *State v. Railroad*, 52 N. H. 528.

77—*Woodward v. Mich., &c., R. R. Co.*, 10 Ohio St. 121; *Needham*

*In Massachusetts the same conclusion has been [*312] reached, the court regarding the recovery which the statute authorizes as in the nature of a statutory penalty, which, though sued for by the administrator, is to be distributed not as a part of the estate generally, but according to a special statutory rule.⁷⁸

Where a suit was brought in Georgia for the killing of the plaintiff's husband in Alabama, it was decided that the suit could not be maintained because by the statute of Alabama the right of action is given to the personal representative.⁷⁹ But if the company doing the injury in Alabama is a Georgia corporation and the suit is brought by a Georgia administrator, the action will lie.⁸⁰ In New York it was at one time held that the remedy was local,⁸¹ but the rule now is that an action will lie for a death in another State, if the statutes of the latter State are substantially like those of New York.⁸² Such is the rule in Iowa,⁸³ Mississip-

v. Grand Trunk, &c., Co., 38 Vt. 294; *McCarthy v. Chicago, &c., Co.*, 18 Kan. 46; *State v. Pittsburgh, &c., Co.*, 45 Md. 41; *Armstrong v. Beadle*, 5 Sawy. 484; *Chicago, &c., Co. v. Schroeder*, 18 Ill. App. 328; *Ash v. Baltimore, &c., R. R. Co.*, 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461; *Harn v. Mexican Nat. Ry. Co.*, 86 Tex. 68, 23 S W. 381. A foreign administrator cannot sue under the statute. Ill. *Central, &c., Co. v. Cragin*, 71 Ill. 177; *Limekiller v. Hannibal, &c., Co.*, 33 Kan. 83. See *Hulbert v. Topoka*, 34 Fed. Rep. 510.

78—*Richardson v. New York Cent. R. R. Co.*, 98 Mass. 85. So far as this case treats the statute as in its nature penal, it is opposed to *Beach v. Bay State Co.*, 30 Barb. 433, and *Lamphear v. Buckingham*, 33 Conn. 237. In a late case a Massachusetts administrator was denied a recovery under the statute as to survival of actions where the injury occurred

in Connecticut, as by the laws of that State, though there was no survival, a penal action lay upon the same state of facts. *Davis v. New York, &c., Co.*, 143 Mass. 301, 58 Am. Rep. 138.

79—*Selma R. R. Co. v. Lacey*, 49 Ga. 106.

80—*Central R. R., &c., Co. v. Swint*, 73 Ga. 651.

81—*Whitford v. Panama R. R. Co.*, 23 N. Y. 465. It makes no difference, as was decided in this case, that the defendant is a New York corporation. See *Mahler v. Transportation Co.*, 35 N. Y. 352; *Campbell v. Rogers*, 2 Handy, (Ohio,) 110.

82—*Leonard v. Columbia, &c., Co.*, 84 N. Y. 48, 38 Am. Rep. 491. An action lies for causing death of a New York citizen on the high seas on a vessel owned by a citizen of that State and registered therein. *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664.

83—*Morris v. Chicago, &c., Co.*,

pi,⁸⁴ Indiana,⁸⁵ and Pennsylvania,⁸⁶ and the Supreme [*313] Court of the *United States has held that an action will lie in New York upon the New Jersey statute for a death occurring in New Jersey through the negligence of a New Jersey corporation at the suit of a New York administrator; the fund recovered to be distributed according to the New Jersey law.⁸⁷

In Alabama under a statute giving an action against the county where one was killed by lynching, etc., it has been held that aliens, though resident abroad, may sue,⁸⁸ and it probably would be so held under any of the statutes referred to.

The weight of authority, at the present time⁸⁹ is strongly to the effect that the action is transitory and that suit will lie under the statute of a foreign State or country when the statutes of the foreign State or country and of the forum evince the same general policy.⁹⁰ The action should be brought by the party in in-

65 Ia. 727, 54 Am. Rep. 39. But no recovery can be had under the statute of the State where the suit is brought. *Hyde v. Wabash, &c., Co.*, 61 Ia. 441, Am. Rep. 820.

84—*Chicago, &c., Co. v. Doyle*, 60 Miss. 977. Where a death occurs in Tennessee, and by the law of that State an administrator is to sue, a Mississippi administrator may recover in Mississippi, though if the injury had occurred there he would not have been the proper party. *Ill. Cent. &c., Co. v. Crudup*, 63 Miss. 291; *contra*, *Vawter v. Miss., &c., Co.*, 84 Mo. 679.

85—*Jeffersonville, &c., Co. v. Hendricks*, 26 Ind. 228; 41 Ind. 48; *Burns v. Grand Rapids, &c., Co.*, 113 Ind. 169, 15 N. E. 230.

86—*Knight v. West Jersey R. R. Co.*, 103 Pa. St. 250, 56 Am. Rep. 200. In Texas a resident of the State has no right to recover for death from an injury suffered in another jurisdiction where there is no similar statute. *Willis*

v. Missouri, &c., Co., 61 Tex. 432, 48 Am. Rep. 301.

87—*Dennick v. Railroad Co.*, 103 U. S. 11.

88—*Luke v. Calhoun Co.*, 52 Ala. 115.

89—Date of third edition A. D., 1906.

90—In addition to the cases already cited, the following since the second edition are referred to: *St. Louis, &c., Ry. Co. v. Haist*, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65; *Chicago, &c., R. R. Co. v. Reuse*, 78 Ill. App. 286; *Chicago Transit Co. v. Campbell*, 110 Ill. App. 366; *Hamilton v. Hannibal, &c., R. R. Co.*, 39 Kan. 56, 18 Pac. 57; *Louisville, &c., R. R. Co. v. Whitlow*, 114 Ky. 470, 43 S. W. 711; *Myers v. Chicago, &c., Ry. Co.*, 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579; *Wooden v. Western N. Y., &c., R. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458; *Harrill v. South Carolina, &c., Ry. Co.*, 132

terest or by the personal representative as may be prescribed by the foreign statute.⁹¹ An action was brought in the District of Columbia for a death in Maryland. The Maryland statute provided that an action for death should be prosecuted in the name of the State. The act of Congress for the District of Columbia provided that such an action should be prosecuted by the personal representative. A suit by the personal representative appointed in the District of Columbia was held proper, and was sustained.⁹²

N. C. 655, 44 S. E. 109; *Boulden v. Pennsylvania R. R. Co.*, 205 Pa. St. 264, 54 Atl. 906; *Thorpe v. Union Pac. Coal Co.*, 24 Utah, 475, 68 Pac. 145; *Utah Trust & Sav. Bank v. Diamond C. & C. Co.*, 26 Utah, 299, 73 Pac. 524; *Nelson v. Chesapeake, &c., R. R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583; *Stewart v. Baltimore, &c., R. R. Co.*, 168 U. S. 445, 18 S. C. 105, 42 L. Ed. 537, (overruling *Stewart v. Baltimore, &c., R. R. Co.*, 6 App. D. C. 56); *Boston, &c., R. R. Co. v. McDuffy*, 79 Fed. 934, 25 C. C. A. 247; *Dennis v. Railroad Co.*, 70 S. C. 254; *Williams v. Camden Interstate Ry. Co.*, 138 Fed. 571 (C. C. A.).

91—*Lower v. Segel*, 60 N. J. L. 99, 36 Atl. 777; *Wooden v. Western N. Y. &c., R. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458; *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206, 17 Atl. 597, 12 Am. St. Rep. 863, 4 L. R. A. 261; *Boulden v. Pennsylvania R. R. Co.*, 205 Pa. St. 264, 54 Atl. 906; *Thorpe v. Union Pac. Coal Co.*, 24 Utah, 475, 68 Pac. 145; *Boston, &c., R. R. Co. v. McDuffy*, 79 Fed. 934, 25 C. C. A. 247.

92—*Stewart v. Baltimore, &c., R. R. Co.*, 168 U. S. 445, 18 S. C. Rep. 105, 42 L. Ed. 537. The

court says: "The purpose of the statutes passed in the states, in more or less conformity to what is known as Lord Campbell's act, is to provide the means of recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial for the benefit of the persons injured by the death. An action to recover damages for a tort is not local but transitory, and can as a general rule be maintained wherever the wrong-doer can be found. (*Dennick v. Central R. R. Co.*, 103 U. S. 11, 26 L. Ed. 439.) It may well be that where a pure statutory right is created the special remedy provided by the statute for the enforcement of that right must be pursued, but where the statute simply takes away a common law obstacle to a recovery for an admitted tort it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common law obstacle has been removed. * * * What are the differences between the two statutes? As heretofore noticed, the substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured. Both

In suits in Missouri for a death in Kansas, whose statute provided for a suit by the administrator, it was held that neither an administrator appointed in Kansas nor one appointed in Missouri could prosecute the suit, nor the party in interest as provided in the Missouri statute.^{92a} Thereupon the legislature passed an act providing as follows: "Whenever any cause of action has occurred under or by virtue of the laws of any other State or

statutes in the case at bar disclose that purpose. By each the death of the party injured ceases to relieve the wrong-doers from liability for damages caused by the death, and this is its main purpose and effect. The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the state; in this District the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. * * By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative. For purposes of jurisdiction in the federal courts regard is had to the real rather than the nominal party. * * * Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute for the District the distribution is made according to the ordinary laws of distribution of a decedent's estate. But by each the important matter is an award of

damages, and the manner of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury must necessarily consider the damages which each beneficiary has sustained by reason of the death. By neither statute is a fixed sum to be given as a penalty for the wrong, but in each the question is the amount of damages. It is true that the beneficiaries of such an action may not in every case be exactly the same under each statute, but the principal beneficiaries under each are the near relatives, those most likely to be dependent upon the party killed, and the remote relatives can seldom, if ever, be regarded as suffering loss from the death. We cannot think that these differences are sufficient to render the statute of Maryland in substance inconsistent with the statute or public policy of the District of Columbia, and so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland." pp. 448-450.

92a—*Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679; *Oates v. Union Pac. R. R. Co.*, 104 Mo. 514.

territory, and the person or persons entitled to the benefit of such cause of action are not authorized by the laws of such State or territory to prosecute such action in his, her or their own names, then, in every such case, such cause of action may be brought in any of the courts of this State, by a person to be appointed for that purpose by the court in which such cause of action is sought to be instituted, or the clerk thereof in vacation, and such person so appointed may institute such action and prosecute the same for the benefit of the person or persons entitled to the proceeds thereof under the laws of the State or territory wherein the cause of action arose."^{92b} In a suit by a person appointed in pursuance of this statute for a death in Illinois, the act was held to be unconstitutional and void.^{92c}

If the statute is final in its nature, as where it provides for the recovery of a fixed sum irrespective of the actual damages, it will not be enforced in a foreign State.⁹³

Who Liable. Where the action is given without any restriction as to the parties who shall be liable, it may be brought against not only natural persons, but corporations, public as well as private.⁹⁴ By some statutes, however, the remedy, or perhaps

92b—R. S. 1899, § 548.

92c—*McGinnis v. Missouri Car, &c., Co.*, 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553. The court says: "A liability or a cause of action that does not exist under the common law, can only be created by the lawmaking power of a sovereign state, or of the United States in proper cases. And when the laws of the creating state prescribe the person who shall enforce the right, no other person in that or any other state can enforce it. The law must be enforced as written or not at all. It cannot be partitioned, and some of its parts transported to another state and added to or be supplemented by the laws of that state. The legislature of this state had

no power to create a liability or preserve a right of action for an act done in Illinois, and it had no power to authorize anyone here to enforce, in the courts of this state, a liability, or to assert a right, that is created by the laws of Illinois, when such a person would have no right to enforce such liability or assert such right in the courts of Illinois." p. 234.

93—*Raisor v. Chicago, &c., Ry. Co.*, 215 Ill. 47, 74 N. E. 69; *Dale v. Atchison, etc. R. R. Co.*, 57 Kan. 601, 47 Pac. 521; *Matheson v. Kansas City, &c., R. R. Co.*, 61 Kan. 667, 60 Pac. 747; *O'Reilly v. New York, &c., R. R. Co.*, 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244.

94—*Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Chicago v.*

a special remedy, is given against railroad companies only, and of course the statute cannot be extended by construction. In Minnesota, and perhaps some other States, it may be brought against a steamboat by name to establish a liability against it.⁹⁵ On a construction of the statutes of Maine it is held that where one is killed by the negligent operation of a railroad in the hands of a lessee, neither the railroad company nor the lessee is liable;⁹⁶ but this seems not consistent with some decisions elsewhere.⁹⁷

[*314] ***The Plaintiff.** Most commonly the action is given to the executor or administrator of the person killed; and an administrator may be appointed for the purpose of bringing it, though there is no estate.⁹⁸ Under many of the statutes, how-

Starr, 42 Ill. 174; *Southwestern R. R. Co. v. Paulk*, 24 Ga. 356. Such acts apply to municipalities though when passed they were not liable for injuries from their defective roads. *Merkle v. Bennington*, 58 Mich. 156, 55 Am. Rep. 666. Corporations are of course responsible for the acts of their servants in these as in other cases. *McAunich v. Mississippi, &c., R. R. Co.*, 20 Iowa, 338; *Sherman v. Western Stage Co.*, 24 Iowa, 515. Under the N. Y. act of 1847, the personal representatives of the wrong doer are not liable for the death. *Hegerich v. Keddle*, 99 N. Y. 258, 52 Am. Rep. 25. Under the Texas act a sheriff is not liable for the act of his deputy in causing the death of an escaping prisoner. *Hendrix v. Walton*, 69 Tex. 192, 6 S. W. 749.

95—*Boutiller v. The Milwaukee*, 8 Minn. 97.

96—*State v. Consolidated, &c., Co.*, 67 Me. 479.

97—In *Railroad Co. v. Barron*, 5 Wall. 90, where one was killed by the negligent use by one com-

pany of the railroad track of another, the latter company was held responsible. Citing *Ohio, &c., R. R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291, and *Nelson v. Vermont, &c., R. R. Co.*, 26 Vt. 717, 62 Am. Dec. 614, which were cases where railroad companies were held liable for injury to stock under corresponding circumstances. In Illinois, where a road is leased, lessor and lessee are both liable for the loss of cattle consequent on failure to fence the road. *Ill. Cent. R. R. Co. v. Kanouse*, 39 Ill. 272, 89 Am. Dec. 307; *Toledo, &c., R. R. Co. v. Rumbold*, 40 Ill. 143. A trustee operating the road for the benefit of creditors is held liable in Connecticut. *Lamphear v. Buckingham*, 33 Conn. 237. The action was held not to lie against the personal representative of the wrong-doer in *Moe v. Smiley*, 125 Pa. St. 136, 17 Atl. 228, 3 L. R. A. 341.

98—*Hartford, &c., R. R. Co. v. Andrews*, 36 Conn. 213. The deceased was resident in Maine, but killed in Connecticut, having no

ever, some one or more of the parties to be benefited by the recovery may sue. Thus, in Alabama, the father, or if he be dead, the mother, may bring suit where the person killed was a minor child.⁹⁹ Several States have similar statutes. In Iowa, it seems by construction, in endeavoring to accommodate the statute to the common law, it is held that where the parents are authorized to sue for the killing of a minor child, there may be two actions: one by a parent, to recover damages for the loss during what would have been the child's minority, and one by an administrator for subsequent damages.¹ In Georgia the statute provides that "a widow, and if no widow, a child or children, may recover for the homicide of the husband or parent;" and it is held that if the widow sues and marries pending the suit, she may proceed to judgment notwithstanding the marriage.² If she dies pending the suit, the action and the right of action survive to the children, whose damages will be measured by the injury to themselves.³ In California the rule is the same, and in *the suit continued for the use of the children, any dis- [*315] cussion of what would be proper compensation to the

property in the last named State, but administration was permitted to be taken there. See *Perry v. St. Joseph, &c., Co.*, 29 Kan. 420. In Indiana it is held that suit should be brought by the general administrator and not by a special administrator appointed for that purpose. *Lake Erie, &c., R. R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923. In general the suit should be brought by the party designated in the statute. *Belding v. Black Hills, &c., R. R. Co.*, 3 S. D. 369, 53 N. W. 750.

99—Code, 1876, § 2899. Under the Act of 1885, the personal representative must sue. *Stewart v. Louisville &c., Co.*, 83 Ala. 493, 4 So. 373. In Louisiana, also, the father may sue for the loss of his minor child by wrongful act

or default. *Frank v. New Orleans, &c., R. R. Co.*, 20 La. Ann. 25.

1—*Walters v. Chicago, &c., R. R. Co.*, 36 Iowa, 458. See *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Barley v. Chicago, &c., R. R. Co.*, 4 Biss. 430.

2—*Georgia, &c., Co. v. Garr*, 57 Ga. 277, 24 Am. Rep. 492. An adult child of one who has left neither widow nor minor child cannot recover. *Mott v. Cent. R. R. &c., Co.*, 70 Ga. 680, 48 Am. Rep. 595. Minor child may recover for the death of the mother. *Atlanta, &c., Co. v. Venable*, 65 Ga. 55.

3—*David v. Southwestern R. R. Co.*, 41 Ga. 223; *Macon, &c., R. R. Co. v. Johnson*, 38 Ga. 409, 435. It seems to be required by statute in this state that the widow suing

widow is wholly irrelevant and should be excluded.⁴ But in Georgia where the widow brings suit and carries it to judgment in her own name, the damages which can be considered are only her own damages, and not those suffered by the children also.⁵ In Texas it is held that there may be separate suits but that the defendant in any suit may by proper plea compel all persons interested to be made parties.⁶ Also that the total recovery should be the same whether there is one suit for all or separate suits.⁷ In the case last cited it appeared that a man was killed leaving a

for the killing of her husband should allege a criminal prosecution therefor, or show some excuse for the failure to institute one. *Allen v. Atlanta St. R. R. Co.*, 54 Ga. 503; *Weekes v. Cottingham*, 58 Ga. 559. *Sawtell v. Western, &c., R. R. Co.*, 61 Ga. 567. In Alabama it is held that the common law doctrine of the merger of the civil action in the felony has no application to this statutory action. *Lankford's Admr. v. Barrett*, 29 Ala. 700.

4—*Taylor v. W. P. R. R. Co.*, 45 Cal. 323.

5—*Macon, &c., R. R. Co. v. Johnson*, 38 Ga. 409. In Pennsylvania the administrator cannot sue. *Books v. Danville*, 95 Pa. St. 158. When a minor leaves a widow his parents have no right of action. *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95. In W. Va. the husband as administrator may recover for the death of the wife. *Dimmey v. Wheeling, &c., Co.*, 27 W. Va. 32, 55 Am. Rep. 292. In Illinois there can be but one action which covers all damage. If there is a widow, it accrues to her; if not, to the children; if no widow or children, then to the "other person" dependent. *Beard v. Skeldon*, 113 Ill. 584. In Nebraska and Minnesota the admin-

istrator must sue. *Wilson v. Bumstead*, 12 Neb. 1; *Scheffer v. Minn. &c., Ry. Co.*, 32 Minn. 125. In Missouri, where if the widow fails to sue within six months, the children may, the voluntary dismissal by the widow of her suit brought within the six months does not give the children the right to sue. *McNamara v. Slavens*, 76 Mo. 329. In Tennessee the widow can dismiss the suit against the wishes of the child. *Stephens v. Railroad Co.*, 10 Lea, 448. In Mississippi the administrator may recover irrespective of the action given to the next of kin. *Vicksburg, &c., Co. v. Phillips*, 64 Miss. 693. If he is the next of kin and sole distributee the whole damage may be recovered in one action. *Ill., &c., R. R. Co. v. Crudup*, 63 Miss. 291. In Texas the widow cannot recover for her own sole benefit when the mother of the deceased is alive. *Dallas, &c., Co. v. Spiker*, 59 Tex. 435. Action of widow not barred by living apart from husband if she has not forfeited right to support. *Id.* 61 Tex. 427.

6—*Galveston, etc., Ry. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127.

7—*Nelson v. Galveston, etc., Ry. Co.*, 78 Tex. 621, 14 S. W. 1021, 22 Am. St. Rep. 81, 11 L. R. A. 391.

wife and daughter who sued and obtained judgment for his death. Afterwards a posthumous child was born who brought suit. It was held that a posthumous child was a surviving child within the statute and that the former suit, not being prosecuted for his benefit, was no bar.⁸ One of the troublesome things connected with this action where others than the personal representative sue, is that it is difficult to provide for the distribution of the moneys recovered among the persons whom the statute intends to benefit; and in general no attempt is made to do it.⁹ If the widow sues, she recovers for her own *benefit, where [*316] if an administrator had sued, the recovery must have been divided with children. And where statutes permit actions to be brought by one of several who would be entitled to sue, and make no provision for distributing the recovery, it would seem that there might be question of the right to maintain two or more actions by the intended beneficiaries severally. Where a widow brought suit and died pending suit, it was held that the suit abated.¹⁰ Where there is a widow and next of kin but no children and the widow dies before or pending suit, the right of action is held not to pass to the next of kin but to become extinguished.¹¹ But in some jurisdictions it is held that the death of the beneficiary pending suit does not abate the suit but that the

8—Ibid. Galveston, etc., Ry. Co. v. Contreas, 31 Tex. Civ. App. 489, 72 S. W. 1051.

9—In Texas there is one action for the benefit of all and the jury divides the amount recovered among the beneficiaries. Railroad Co. v. LeGierse, 51 Tex. 189. Under the Wisconsin statute the widow takes the benefit to the exclusion of the children. Schade-wald v. Milw., &c., Ry. Co., 55 Wis. 569.

10—Loague v. Railroad Co., 91 Tenn. 458, 19 S. W. 430; Schmidt v. Menasha Woodenware Co., 99 Wis. 300, 74 N. W. 797. As to proper plaintiff in suit under for-

eign statute, see *ante*, p. 556-560.

11—Louisville, etc., R. R. Co. v. Bean, 94 Tenn. 388, 29 S. W. 370. "The right of recovery having once vested in the widow, it did not pass, upon her death, to her personal representative; neither did it revert in the next of kin of deceased, for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished." p. 395. So in Dillier v. Cleveland, etc., Ry. Co., 34 Ind. App. 52, 72 N. E. 271.

recovery will be limited to the loss sustained while such beneficiary lived.¹² In South Carolina it has been held that where the father of deceased was the sole beneficiary under the statute and died before trial, the suit could be prosecuted for the benefit of the brothers and sisters of the deceased.^{12a}

The Beneficiaries. Where the personal representative brings the suit, his position in respect to it and to the moneys recovered is peculiar. The cause of action is not given in favor of the estate proper.¹³ If it was, the moneys would be accounted for with other assets, and, in case of an estate otherwise insolvent, would be appropriated by creditors. But the purpose of these statutes is to make provision for members of the family of the deceased who might naturally have calculated on receiving support or assistance from the deceased had he survived. Thus, under the English statute the action is to be for the benefit of the wife, husband, parent, or child; it is clear that creditors can have no share in this, but the recovery must be a special fund, to be paid over by the personal representative to the person or persons for whom the statute intends it.¹⁴ It is also obvious that there might be cases in which no action could be brought by an executor or administrator, because of there being no person in existence who would be entitled to the moneys. Thus, if the action be given for the benefit of the widow and children only, and there be neither, there can be no action;¹⁵ and it [*317] seems to be necessary in some States to *name in the declaration the person for whose benefit the suit is brought,

12—Cooper v. Shore Elec. Co., Tex. 403. See Gibbs v. Hannibal, 63 N. J. L. 558, 44 Atl. 633; Pitkin v. New York Central, etc., R. R. Co., 94 App. Div. 31, 87 N. Y. S. 906.

12a—Morris v. Spartenburg, etc., Co., 70 S. C. 279.

13—See Whitford v. Panama R. Co., 23 N. Y. 465; Chicago v. Major, 18 Ill. 349; Waldo v. Goodsell, 33 Conn. 432; Haggerty v. Central R. R. Co., 31 N. J. 349; Houston, &c., Ry. Co. v. Hook, 60

&c., Co., 87 Mo. 143; South, &c., R. R. Co. v. Sullivan, 59 Ala. 272. 14—Chicago v. Major, 18 Ill. 349; Lyon's Admr. v. Cleveland, &c., R. R. Co., 7 Ohio St. 336; Andrews v. Hartford, &c., R. R. Co., 34 Conn. 57.

15—Jordan v. Cinninnati, etc., R. R. Co., 89 Ky. 40, 11 S. W. 1013; Hackett v. Louisville, etc., R. R. Co., 95 Ky. 236, 24 S. W. 871. It seems that in Ohio,

and to show the relationship.¹⁶ But where the recovery is to be distributed as the personal estate of an intestate would be, it must be assumed that kindred exist, and it need not be averred.¹⁷

In such a statute where the words "heir or heirs" were used to

where the action is given for the benefit of the widow and next of kin, if the action is brought for the killing of the wife, the husband is entitled as next of kin to such share as he would take in her estate under the statute of distributions; the words "next of kin" being used in the statute in this peculiar sense. *Steel v. Kurtz*, 28 Ohio St. 191. Compare *Lucas v. N. Y. Cent. R. R. Co.*, 21 Barb. 245. If parents and child are killed at once, there can be no action. *Gibbs v. Hannibal, &c., Co.*, 82 Mo. 143. The emancipation of the son is not conclusive against recovery for the benefit of the next of kin. *St. Joseph, &c., Ry. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461. The fact that the children of the deceased are adults, not living with him, is not conclusive against their pecuniary interest in his life. *Lockwood v. New York, &c., Co.*, 98 N. Y. 523. Brothers and sisters of a deceased minor may reasonably expect pecuniary advantage from the continuance of the life. *Chicago, &c., Co. v. Keefe*, 114 Ill. 222. The claim need not amount to a legal right to support; reasonable expectation of pecuniary benefit is enough. *Balt., &c., R. R. Co. v. State*, 60 Md. 449. See, *Id.* 63 *Id.* 135.

16—*Chicago City Ry. Co. v. Hackendahl*, 188 Ill. 300, 58 N. E. 930; *Foster v. St. Luke's Hospital*, 191 Ill. 94, 60 N. E. 803; *Topping v. St. Lawrence*, 86 Wis. 526,

57 N. W. 365. Where the declaration mentions the father only, the recovery must be limited to his loss, and cannot be extended by showing on the trial that there are also a mother and brothers and sisters. *Quincy Coal Co. v. Hood*, 77 Ill. 68. See *Chicago, &c., R. R. Co. v. Morris*, 26 Ill. 400. In Indiana it is sufficient to aver that there are persons who would be entitled, but they need not be named. *Jeffersonville, &c., R. R. Co. v. Hendricks*, 41 Ind. 49. And, see *Woodward v. Chicago, &c., R. R. Co.*, 23 Wis. 400; *Lucas v. N. Y. Cent. R. R. Co.*, 21 Barb. 245.

Where children are made the beneficiaries, illegitimate children are not included. *Dickinson v. N. E. Railway Co.*, 2 H. & C. 735. But they may be entitled as next of kin of their mother when she is the person killed. *Muhl v. Southern, &c., R. R. Co.*, 10 Ohio St. 272. The mother of an illegitimate child cannot recover for its death. *Gibson v. Midland Ry. Co.*, 2 Ontario, 658.

17—*Alabama, &c., R. R. Co. v. Waller*, 48 Ala. 459.

Where the statute makes the widow and next of kin the beneficiaries, the action may be maintained where there is a widow and no kindred, or where there is next of kin and no widow. *Oldfield v. New York, &c., R. R. Co.*, 14 N. Y. 310; *Haggerty v. Central R. R. Co.*, 31 N. J. 349; *Lyons v. Cleveland, &c., R. R. Co.*, 7 Ohio St. 336.

denote the beneficiaries, they were held to mean child or children.¹⁸ The next of kin are those who would inherit under the statute of descent and distribution,¹⁹ and are to be determined as of the date of the death sued for.²⁰ Non-resident aliens, though within the terms of the statute, have been held not to be entitled to its benefits.²¹ But the contrary has also been held.²² The next of kin of an adopted child are its relations by blood and not its adopted parents.²³ If the benefit is given to a child or children only legitimate children are intended.²⁴ Illegitimate children cannot recover for the death of their father or mother.²⁵ Nor can the father or mother recover for the death of the illegitimate child.²⁶ A child may not recover for the death of its step-father.²⁷ Where the action is given in favor of the widow and next of kin, the husband cannot sue for the death of his wife.²⁸

What is Wrongful Act, Neglect, or Default. In most cases the question of the right to recover is merely a question of negli-

18—*Hindry v. Holt*, 24 Colo. 1658; *Citizens' St. Ry. Co. v. Cooper*, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319; *Heidecamp v. Jersey City, etc., St. Ry. Co.*, 69 N. J. L. 284, 55 Atl. 239, 40, 11 S. W. 1013.

19—*Hindry v. Holt*, etc., Ry. Co. v. Ryan, 62 Kan. 682, 64 Pac. 603.

20—*Mundt v. Glokner*, 26 App. Div. 123, 50 N. Y. S. 190.

21—*Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 37 Atl. 558; 51 L. R. A. 827.

22—*Robinson v. Georgia R. R. & Banking Co.*, 117 Ga. 168, 43 S. E. 452, 97 Am. St. Rep. 156; *Thornburg v. Am. Strawboard Co.*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334; *McDonald v. Pittsburgh, etc., Ry. Co.*, 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 52 L. R. A. 309; *McDonald v. Southern Ry. Co.*, 71 S. C. 352, 51 S. E. 138.

23—*Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E. 94; *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386; *Vetatoro v. Perkins*, 101 Fed. 393; *Augusta Ry. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Alfson v. Bush Co.*, 182 N. Y. 393, 75 N. E. 230.

24—*Citizens' St. Ry. Co. v. Willoeby*, 15 Ind. App. 312, 43 N. E. 28—*Grosso v. Delaware, etc., R.*

gence, and is to be governed by the same principles and considerations as questions of negligence where the results were less serious.²⁹ The reader is therefore referred to the chapter on negligent injuries for their discussion. Where the act was one of intentional violence, the question that would *arise if [*318] the right of recovery were disputed must be one of justification or excuse, and would be the same as in cases of trespass to the person.³⁰ This also, therefore, requires no special discussion here.

Proximate Cause. The wrongful act, neglect, or default must have been the proximate cause of death.³¹ But it is the proximate cause if it inflicts a fatal injury, though the death that would have resulted is anticipated by an unskillful surgical operation.³²

R. Co., 50 N. J. L. 317, 13 Atl. 233.

29—The mere fact that a minor is killed in course of a dangerous employment will give the mother no right of action. She must show facts entitling the minor, had he lived, to recover. *Texas, &c., R. R. Co. v. Crowder*, 70 Tex. 222, 7 S. W. 709. Held that the wrongful act, neglect or default must have caused the death; not enough that it contributed thereto. *Chase v. Nelson*, 39 Ill. App. 53.

30—*White v. Maxcy*, 64 Mo. 552. If it is sought to hold one as accessory to a homicide, he must be shown to have done something. His mere presence at the killing is not enough. *Gray v. McDonald*, 28 Mo. App. 477. Under the Kentucky statute, which only gives an action where the death was caused by the "willful neglect" of another, no action will lie if the killing was intentional. *Spring's Admr. v. Glenn*, 12 Bush, 172. But a carrier is liable for a wanton injury causing death inflicted on a passenger by its servant.

Winnegar v. Centr., &c., Co., 85 Ky. 547, 4 S. W. 237. Under the R. I. statute, there is no liability where the death ensues from a failure to act, as to put a sufficient cover on a cistern. *Bradbury v. Furlong*, 13 R. I. 15, 43 Am. Rep. 1. An action will not lie for hastening death, as of a wounded man carried on the cars. *Jackson v. St. Louis, &c., Co.*, 87 Mo. 422, 56 Am. Rep. 460. One will lie for causing death of a drunkard by inducing him to drink a great quantity of liquor at one sitting. *McCue v. Klein*, 60 Tex. 168, 48 Am. Rep. 260.

31—*Rogers v. Hughes*, 87 Ky. 185, 8 S. W. 16; *Carrigan v. Stillwell*, 97 Me. 247, 54 Atl. 389.

32—*Sauter v. N. Y. Cent., &c., R. R. Co.*, 66 N. Y. 50. *Nagel v. Miss., &c., R. R. Co.*, 75 Mo. 653. See on proximate cause of death. *Scheffer v. Railroad Co.*, 105 U. S. 249; *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163, 45 Am. Rep. 30, and cases in Ch. III. pp. *73-*91.

Defenses. Contributory negligence of the next of kin, for whose benefit the suit is brought, defeats the action.³³ But in a suit by an administrator for the death of a child, it was held that the contributory negligence of the parents would not prevent a recovery, though they would share in the benefits.³⁴ A release by the next of kin executed before the employment of the deceased was held void as against public policy and therefore no defense to the action.³⁵ Where the deceased was a railroad employee and member of a railroad relief association and left a widow and one child it was held that the widow might elect between accepting the benefits of her husband's membership and prosecuting the action for death, that acceptance of the benefits barred her own right but that she might still sue as administratrix for the benefit of the child.³⁶ The action accrues on the date of the death and the statute of limitations begins to run from that time.³⁷ Where the suit is for the benefit of the widow of deceased her remarriage may not be shown, either as a defense to the action or in mitigation of damages.³⁸ In a suit by a father for the death of his infant child, it is no defense that the child had lived with his grandparents since his birth with the father's consent.³⁹

33—*St. Louis, etc., Ry. Co. v. Dawson*, 68 Ark. 1, 56 S. W. 46; *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; *Ploof v. Burlington Traction Co.*, 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108. "The doctrine of imputed negligence has no application to the case, but the rule that the negligent father cannot recover is founded upon the fundamental principle that no one can acquire a right of action by his own negligence." *Richmond, etc., R. R. Co. v. Martin*, 102 Va. 201, 45 S. E. 894.

34—*Wymore v. Mahaska Co.*, 78 Ia. 396, 43 N. W. 264, 16 Am. St. Rep. 449, 6 L. R. A. 545.

35—*Tarbell v. Rutland R. R.*

Co., 73 Vt. 347, 51 Atl. 6, 87 Am. St. Rep. 734, 56 L. R. A. 656.

36—*Pittsburgh, etc., Ry. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419.

37—*Louisville, etc., R. R. Co. v. Clarke*, 152 U. S. 230, 14 S. C. Rep. 579, 38 L. Ed. 422.

38—*Chicago, etc., R. R. Co. v. Driscoll*, 207 Ill. 9, 69 N. E. 620; *Consolidated Stove Co. v. Morgan*, 160 Ind. 241, 66 N. E. 696; *Chicago, etc., Ry. Co. v. Lagerkrans*, 65 Neb. 566, 95 N. W. 2; *Philpot v. Pennsylvania R. R. Co.*, 175 Pa. St. 570, 34 Atl. 856; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

39—*Elwood Elec. St. Ry. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535.

What Damages Recoverable. It seems to have been made a question, both in England and this country, whether, if the plaintiff showed the wrong, resulting in death, but failed to prove actual damages, he was entitled to recover even the nominal damages which are supposed to flow from any technical legal wrong. In England the rule is settled that the action will not be supported for the recovery of merely nominal damages.⁴⁰ The ground seems to be that no one shows himself entitled as beneficiary until he shows that personally he has suffered; in other *words, that, as in some cases of slander, it is neces- [*319] sary to prove special damage, in order to convert what may be a moral wrong into a legal wrong, so here the wrongful act or default is not shown to be a tort to the person complaining of it until he traces perceptible injurious consequences to himself. Pecuniary loss will be presumed to result to the widow and minor children from the death of the husband and father,⁴¹ and to parents from the death of minor children.⁴² But there is no such presumption where the beneficiaries are brothers and sisters or other collateral kindred and, in such cases there must be evidence of pecuniary loss.⁴³ So in case of adult children suing for the death of their mother.⁴⁴ Where the statute fixes a

40—*Duckworth v. Johnson*, 4 H. & N. 653; *Boulter v. Webster*, 13 W. R. 289; 11 L. T., (N. S.) 598. Compare *Lyons v. Cleveland, &c.*, R. R. Co., 7 Ohio St. 336; *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 60, 78 Am. Dec. 322; *Quin v. Moore*, 15 N. Y. 432. In Kansas nominal damage may be recovered although the life is of no pecuniary value to the next of kin. *Atchison, &c., Co. v. Weber*, 33 Kan. 543.

41—*Chicago, etc., R. R. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701; *Louisville, etc., Ry. Co. v. Buck*, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520.

42—A verdict for \$5,000 for the death of a boy of twelve was sus-

tained in the following case, the father being dead and the mother and brothers and sisters being the next of kin, though there was no proof of pecuniary loss. *Bradley v. Sattler*, 156 Ill. 603, 41 N. E. 171.

43—*Chicago, etc., R. R. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701; *Diebold v. Sharp*, 19 Ind. App. 474, 49 N. E. 837; *Wabash Ry. Co. v. Cregan*, 23 Ind. App. 1, 54 N. E. 767; *Cleveland, etc., Ry. Co. v. Drumm*, 32 Ind. App. 547, 70 N. E. 286; *Atchison, etc., R. R. Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603.

44—*Chicago, etc., R. R. Co. v. Ptacek*, 171 Ill. 9, 49 N. E. 191.

minimum of recovery, as some of those in this country do, there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss.⁴⁵ But in this country as well as in England, the ground of recovery must be something besides an injury to the feelings and affections, or a loss of the pleasure and comfort of the society of the person killed; there must be a loss to the claimant that is capable of being measured by a pecuniary standard.⁴⁶ As a general rule and under most of the statutes the recovery is limited to the pecuniary loss sustained by the beneficiaries.⁴⁷ The California statute provides that such damages may be given as, under all the circumstances of the case, may

45—*Lamphear v. Buckingham*, 33 Conn. 237. The minimum sum fixed by statute was one thousand dollars, and the court awarded it on overruling demurrer to the declaration.

46—*Franklin v. Southeastern R. Co.*, 3 H. & N. 211; *Blake v. Midland R. Co.*, 18 Q. B. 93; *Pym v. Great Nor. R. Co.*, 4 Best & S. 396; *Mitchell v. N. Y. Cent., &c.*, R. R. Co., 2 Hun, 535; S. C. 5 N. Y. Sup. Ct. (T. & C.) 122; *Chicago v. Major*, 18 Ill. 349; *Chicago, &c., R. R. Co. v. Harwood*, 80 Ill. 88; *Rockford, &c., R. R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *Brady v. Chicago*, 4 Biss. 448; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Louisville, &c., R. R. Co. v. Case's Admr.*, 9 Bush, 728; *Ohio, &c., R. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Ewen v. Chicago, &c., R. R. Co.*, 38 Wis. 614; *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318; *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315; *Telfer v. Northern R. R. Co.*, 30 N. J. 188; *Donaldson v. Mississippi, &c., R. R. Co.*, 18 Iowa, 280; *Mynning v. Detroit, &c., R. R. Co.*, 59 Mich. 257;

Holmes v. Oreg., &c., R. R. Co., 6 Sawy. 262; *Galveston v. Barbour*, 62 Tex. 172. See *St. Louis, &c., Co. v. Freeman*, 36 Ark. 41. The pain and suffering by the deceased are not elements of damage to be recovered by survivors. *Barron v. Illinois, &c., R. R. Co.*, 1 Biss. 412. In Scotland the jury are permitted to award a solatium for injured feelings. *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748.

47—*Union Pac. Ry. Co. v. Jones*, 21 Colo. 340, 40 Pac. 891; *Denver, etc., R. R. Co. v. Spencer*, 27 Colo. 313, 61 Pac. 606; *Baltimore, etc., R. R. Co. v. Golway*, 6 App. D. C. 143; *Duval v. Hunt*, 34 Fla. 85, 15 So. 876; *Consolidated Coal Co. v. Maekl*, 130 Ill. 551, 22 N. E. 715; *North Chicago St. R. R. Co. v. Brodie*, 156 Ill. 317, 40 N. E. 942; *Chicago, etc., R. R. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701; *Wabash Ry. Co. v. Cregan*, 23 Ind. App. 1, 54 N. E. 767; *Cherokee, etc., Min. Co. v. Limb*, 47 Kan. 469, 28 Pac. 181; *Atchison, etc., R. R. Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603; *McKay v. New Eng. Dredging Co.*, 92 Me. 454, 43 Atl. 29; *Charlevoix v. Goge-*

be just and reasonable. It was first held that, under this statute, damages might be given for the mental anguish of the beneficiaries and for the loss of the society and comfort of the deceased.⁴⁸ But the later cases adhere to the general rule and limit the recovery to the pecuniary loss and hold that the loss of the care, comfort and society of the deceased can only be considered for the purpose of estimating the pecuniary damages.⁴⁹ The South Carolina statute provides that "in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." Under this statute it has been held that the recovery is not limited to the pecuniary loss but that compensation may be given for grief and mental suffering.⁵⁰

bic, etc., R. R. Co., 91 Mich. 59, 51 N. W. 812; *Anderson v. Chicago, etc., R. R. Co.*, 35 Neb. 95, 52 N. W. 840; *May v. West Jersey, etc., R. R. Co.*, 62 N. J. L. 63, 42 Atl. 163; *May v. West Jersey, etc., R. R. Co.*, 62 N. J. L. 67, 42 Atl. 165; *Cooper v. Shore Elec. Co.*, 63 N. J. L. 558, 44 Atl. 633; *Cincinnati St. Ry. Co. v. Altemeier*, 60 Ohio St. 10, 53 N. E. 300; *Carlson v. Ore. Short Line*, 21 Ore. 450, 28 Pac. 497; *McHugh v. Schlosser*, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574; *Schnable v. Providence Pub. Market*, 24 R. I. 477, 53 Atl. 634; *Proctor v. San Antonio St. Ry. Co.*, 26 Tex. Civ. App. 148, 62 S. W. 938.

48—*Cleary v. City R. R. Co.*, 76 Cal. 240, 18 Pac. 269; *Munro v. Dredging, etc., Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248.

49—*Morgan v. Southern Pac. Co.*, 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Harrison v. Sutter*

St. Ry. Co., 116 Cal. 156, 47 Pac. 1019; *Peffer v. Southern Pac. Co.*, 105 Cal. 389, 38 Pac. 974; *Redfield v. Oakland Con. St. Ry. Co.*, 110 Cal. 277, 42 Pac. 822; *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577; *Wales v. Pac. Elec. Motor Co.*, 130 Cal. 521, 62 Pac. 1120; *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972.

50—*Nohrden v. Northeastern R. R. Co.*, 59 S. C. 87, 37 S. E. 228, 82 Am. St. Rep. 826; *Stuckey v. Atlantic Coast Line R. R. Co.*, 60 S. C. 237, 38 S. E. 416, 85 Am. St. Rep. 842; *Brown v. Southern Ry. Co.*, 65 S. C. 260, 43 S. E. 794. The ground of recovery in Tennessee seems to be much broader than in most States, and is fully explained in *Collins v. East Tennessee, &c., R. R. Co.*, 9 Heisk. 841. See, also, *Nashville, &c., R. R. Co. v. Prince*, 2 Heisk. 580; *Nashville, &c., R. R. Co. v. Smith*, 6 Heisk. 174; *Haley v. Mobile, &c., Co.*, 7 Bax. 239; *Nashville, &c., Co. v. Smith*, 9 Lea, 470; *East Tenn., &c., R. R. Co. v. Toppins*, 10 Lea, 58. In

Exemplary damages may not be recovered, unless the statute expressly, or by implication, allows them, as in some instances it does.⁵¹ The Supreme Court of Maine says: "No punitive damages can be recovered, nor any damages by way of penalty. No damages can be recovered for any suffering by, nor injury to, the deceased himself or his estate. * * * No damages can be recovered for any grief, distress of mind, loss of mere companionship or society, or injury to the affections, suffered by the beneficiaries. Nor can damages be recovered for the value of the life to the deceased, to the State or community. The injury for which damages can be recovered must be wholly to the beneficiaries themselves, and it is limited to the pecuniary effect of the death upon them."⁵² But in estimating actual damages, some departure from the standards applied in

Connecticut, under an act passed in 1848, the recovery was for the damages for the personal injury and suffering of the party himself if he survived, but for the same damages if he did not survive. *Seger v. Barkhamsted*, 22 Conn. 290; *Masters v. Warren*, 27 Conn. 293. The act was amended in 1853 so as to fix a minimum of one thousand dollars and a maximum of five thousand dollars to the amount of the recovery, but without changing the basis of recovery. *Soule v. New York, &c.*, R. R. Co., 24 Conn. 575; *Goodsell v. Hartford, &c.*, R. R. Co., 33 Conn. 51. And see *Sharp v. National Biscuit Co.*, 179 Mo. 553, 78 S. W. 787.

51—*Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *McKay v. New Eng. Dredging Co.*, 92 Me. 454, 43 Atl. 29. See *Myers v. San Francisco*, 42 Cal. 215, in which a judgment of five thousand dollars for the killing of a child seven years of age by the running of a fire engine over it, was sustained as

not excessive. In Kentucky punitive damages are allowed by the statute when the fatal neglect is willful. *Jacobs v. Louisville, &c.*, R. R. Co., 10 Bush, 263. See *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406. As to what willful neglect is, see *Lexington v. Lewis's Admr.*, 10 Bush, 677. As to exemplary damages under the Texas act, see *Houston, &c., Co. v. Cowser*, 57 Tex. 293. The statute of Missouri provides that "the jury may give such damages, not exceeding five thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default." This is held to warrant exemplary damages in *Haehl v. Wabash R. R. Co.*, 119 Mo. 325, 24 S. W. 737.

52—*McKay v. New Eng. Dredging Co.*, 92 Me. 454, 43 Atl. 29.

*other cases is essential, as otherwise, in some cases, no [*320] recovery could be had at all, though the statute plainly gives the action. If a parent sues for the killing of a minor child, who is yet too young to render services, it is manifest that for the time being there could be no pecuniary loss whatever; and whether the child, if living, would ever become serviceable, must be matter for speculation only. Yet, as the statutes plainly give the right of action for the benefit of the parent, without restriction to circumstances, but manifestly assume that there is some injury in every case, the right to recover in these cases must be deemed unquestionable.⁵³ So the parent may recover for causing *the death of a child who was of full age and not residing with the [*321] parent, and upon whom the parent would have no legal

53—Tutwiler Coal, etc., Co. v. Mo. 321; Gorham v. New York, Enslen, 129 Ala. 336, 30 So. 600; &c., Co., 23 Hun, 449. See Hoppe Morgan v. Southern Pac. Co., 95 v. Chicago, &c., Co., 61 Wis. 357; Cal. 510, 30 Pac. 633, 29 Am. St. Little Rock, &c., Co. v. Barker, Rep. 143, 17 L. R. A. 71; Pierce 39 Ark. 491; Scheffler v. Minn., v. Conners, 20 Colo. 178, 37 Pac. &c., Ry. Co., 32 Minn. 518; Balti- more, etc., Ry. Co. v. Then, 159 721, 46 Am. St. Rep. 279; Illi- nois Central R. R. Co. v. Rear- don, 157 Ill. 372, 41 N. E. 871; Baltimore, etc., R. R. Co. v. Then, 159 Ill. 535, 42 N. E. 97; Louis- ville, etc., Ry. Co. v. Rush, 127 Ind. 545, 26 N. E. 1010; Gunder- son v. N. W. Elevator Co., 47 Minn. 161, 49 N. W. 694; Parsons v. Missouri Pac. Ry. Co., 94 Mo. 286, 6 S. W. 464; Tucker v. Dra- per, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; Beaman v. Martha W. Min. Co., 23 Utah, 139, 63 Pac. 631; Thompson v. Johnston Bros. Co., 86 Wis. 576, 57 N. W. 293. Such recovery was denied, how- ever, in Georgia. See Allen v. At- lanta, &c., Street Railway Co., 54 Ga. 503. Not necessary to show actual damage suffered to warrant substantial recovery. Nagel v. Miss., &c., Ry. Co., 75 Mo. 653; Grogan v. Broadway, &c., Co., 87 Mo. 321; In Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553, a recovery of eight hundred dollars for causing the death of a child four years old was supported. A still larger judgment for the killing of a young child was supported in Louisville, &c., R. R. Co. v. Con- nor, 9 Heisk. 19. And see Chicago v. Scholten, 75 Ill. 468; Philadel- phia, &c., R. R. Co. v. Long, 75 Pa. St. 257; Quin v. Moore, 15 N. Y. 432; Ihl v. Forty-Second Street, &c., R. R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Un. Pac., &c., Co. v. Dunden, 37 Kan. 1, 14 Pac. 501. A verdict for \$5,000 for the death of a child of four was sustained in Illinois; United States Brew- ing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081; but the same

claim to any assistance whatever.⁵⁴ Here the accustomed donations of the child constitute an element of damage, and the parent may give evidence of his own pecuniary circumstances and dependent condition, as tending to show that his loss was probably greater than it would have been had he been independent in respect to pecuniary means.⁵⁵ The true basis of recovery seems to be stated by POLLOCK, C. B.: "It has been held," he says, "that these damages are not to be given as a *solatium*. That was so de-

amount was held excessive in New Jersey; *Graham v. Consolidated Traction Co.*, 64 N. J. L. 10, 44 Atl. 964. See also *Bradley v. Sattler*, 156 Ill. 603, 41 N. E. 171; *Rowe v. New York, etc., Telephone Co.*, 66 N. J. L. 19, 48 Atl. 523. In *Snyder v. Lake Shore, etc., Ry. Co.*, 131 Mich. 418, 91 N. W. 643, the court refused to set aside a judgment of \$250 for the death of a boy of eleven as inadequate. The present value of the future earnings of the child during minority, less the cost of its maintenance, and the expenses of sickness and burial, is the measure of damage in some states. *Burton v. Chicago, &c., Co.*, 55 Ia. 496. See *Penn., &c., Co. v. Lilly*, 73 Ind. 252; *Lehigh, &c., Co. v. Rupp*, 100 Penn. St. 95; *Robel v. Chicago, &c., Co.*, 35 Minn. 84; *Rains v. St. Louis, &c., Co.*, 71 Mo. 164; *Frick v. St. Louis, &c., Co.*, 75 Mo. 542; *Hickman v. Miss., &c., Co.*, 22 Mo. App. 344; *Parsons v. Mo. Pac., &c., Co.*, 94 Mo. 286, 6 S. W. 464; *Louisville, etc., Ry. Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010; *Schnable v. Providence Pub. Market*, 24 R. I. 477, 53 Atl. 634. But in Wisconsin and other states it is held that the expectation of benefit beyond majority may be considered. *Johnson v. Chicago, &c., Co.*, 64 Wis. 425; *Thompson*

v. Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298; *Tutwiler Coal, etc., Co. v. Enslen*, 129 Ala. 336, 30 So. 600; *Baltimore, etc., R. R. Co. v. Then*, 159 Ill. 535, 42 N. E. 971; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 71 N. E. 1081; *Beaman v. Martha W. Min. Co.*, 23 Utah, 139, 63 Pac. 631. Age and circumstances of the parent may be considered. *Johnson v. Chicago, &c.*, 64 Wis., 425; *Int., &c., R. R. Co. v. Kindred*, 57 Tex. 491. *Contra*, *Chicago v. McCulloch*, 10 Ill. App. 459. Recovery not limited to pecuniary loss in case of death of child. *Sharp v. National Biscuit Co.*, 179 Mo. 553, 78 S. W. 787.

54—*Fordyce v. McCants*, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296; *Duval v. Hunt*, 34 Fla. 85, 15 So. 876; *Louisville, etc., Ry. Co. v. Wright*, 134 Ind. 509, 34 N. E. 314; *Cherokee, etc., Min. Co. v. Limb*, 47 Kan. 469, 28 Pac. 181. Where the suit was for the benefit of the father for the death of his adult son it was held the measure of damages was the probable amount of benefits the father would have received during his own expectancy of life. *Fordyce v. McCants*, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296.

55—*Chicago v. Powers*, 42 Ill.

cided for the first time *in banc*, in *Blake v. Midland Railway Company*.⁵⁶ That case was tried before PARKE, B., who told the jury that the Lord Chief Baron had frequently ruled at *nisi prius*, and without objection, that the claim for damage must be founded on pecuniary loss, actual or expected, and that mere injury to feelings could not be considered. It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants, had the deceased lived, and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life."⁵⁷ In some cases

*the reasonable expectation is fairly measured by the [*322] legal right; as where the widow sues for the loss of her husband, who was legally bound to furnish her a reasonable sup-

169, 89 Am. Dec. 418. See *Chicago, &c., R. R. Co. v. Shannon*, 43 Ill. 338; *Potter v. Chicago, &c., R. R. Co.*, 22 Wis. 615; *Ewen v. Chicago, &c., R. R. Co.*, 38 Wis. 613; *Barley v. Chicago, &c., R. R. Co.*, 4 Biss. 430; *North Penn., &c., Co. v. Kirk*, 90 Pa. St. 15.

56—18 Q. B. 93. See *Carlson v. Oregon Short Line*, 21 Ore. 450, 28 Pac. 497; *McHugh v. Schlosser*, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574; *Schnable v. Providence Pub. Market*, 24 R. I. 477, 53 Atl. 634; *Davidson Benedict Co. v. Severson*, 109 Tenn. 572, 72 S. W. 967.

57—*Franklin v. South Eastern R. Co.*, 3 H. & N. 211. See *Dalton v. South Eastern R. Co.*, 4 C. B. (N. S.) 296; *Pym v. Great Nor. R. Co.*, 2 Best & S. 759; 4 Best & S.

396; *Grotenkemper v. Harris*, 25 Ohio St. 510; *Kessler v. Smith*, 66 N. C. 154; *Railroad Co. v. Barron*, 5 Wall. 90; *Ewen v. Chicago, &c., R. R. Co.*, 38 Wis. 613; *Steel v. Kurtz*, 28 Ohio St. 191; *Huntingdon, &c., R. R. Co. v. Decker*, 84 Penn. St. 419; *Mansfield Coal Co. v. McEnery*, 91 Pa. St. 185, 36 Am. Rep. 662; *Demarest v. Little*, 47 N. J. L. 28; *Shaber v. St. Paul, &c., Co.*, 28 Minn. 103; *Atchison, &c., Co. v. Brown*, 26 Kan. 443, where an adult left a mother who had some property of her own. In New York it is held that the pecuniary loss may consist of actual damages, that is an actual, definite loss, capable of proof, and also of prospective and general damages, incapable of precise, definite estimate. In estimating

port during her life time according to his condition in life; and the loss of this reasonable support is the measure of her recovery.⁵⁸ In a suit for the benefit of the widow it was held in Pennsylvania that "the pecuniary loss is what the deceased would probably have earned by his labor, physical or intellectual, in his business or profession, if the injury that caused death had not befallen him, and which would have gone to the support of his family. In fixing this amount, consideration should be given to

the value of a human life the age, sex, health and intelligence of deceased, and condition and circumstances of survivors must be shown. *Houghkirk v. Pres., &c., D. & H. C. Co.*, 92 N. Y. 219, 44 Am. Rep. 370. See *Carpenter v. Buffalo, &c., R. R. Co.*, 38 Hun, 116. A husband may recover for funeral expenses of the wife as an item of damage from the death. *Murphy v. New York, &c., Co.*, 88 N. Y. 445, and cases cited. Damages of wife for death of husband embrace loss of support and protection during her probable life-time, increase that earnings of husband would have made to her wealth, and reasonable expectation she had of pecuniary advantage by ultimately receiving a share thereof as heir and disappointment of such expectation and probable pecuniary loss therefrom. *Lawson v. Chicago, &c., Ry. Co.*, 64 Wis. 447, 54 Am. Rep. 634. She cannot recover for loss of the husband's companionship. *Board of Com'rs v. Legg*, 93 Ind. 523. Under the Canadian statute the injury is not confined to a pecuniary interest "in a sense so limited as only to embrace loss of money or property" where action is brought for the death of wife and mother for the benefit of the hus-

band and children. Injury must not be sentimental nor the damage a solatium, but it need not be susceptible of reduction to dollars and cents. *St. Lawrence, &c., Ry. Co. v. Lett*, 11 Can. S. C. R. 422. In California the statute allows a recovery by the wife for the loss of husband's society and by the father for something beside the loss of service of the child. *Bee-son v. Green Mt., &c., Co.*, 57 Cal. 20; *Cook v. Clay, St., &c., Co.*, 60 Cal. 604; *Nehrbas v. Centr. Pac. &c., Co.*, 62 Cal. 320. The parent may recover for his mental suffering. *Cleary v. City R. R. Co.*, 76 Cal. 240, 18 Pac. 269; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019. In Virginia the recovery is not limited to pecuniary damages. *Matthews v. Warner*, 29 Gratt. 570, 26 Am. Rep. 396; *Balt., &c., R. R. Co. v. Noell*, 32 Gratt. 394. In Alabama something more than a solatium or compensation may be recovered. The act is punitive. *South, &c., R. R. Co. v. Sullivan*, 59 Ala. 272. 58—*Macon, &c., R. R. Co. v. Johnson*, 38 Ga. 409. Approved in *Atlanta, &c., R. R. Co. v. Ayres*, 53 Ga. 12; *Georgia, &c., Co. v. Pittman*, 73 Ga. 325. Compare *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282.

age of the deceased, his health, his ability and disposition to labor, his habits of living, and his expenditures.”⁵⁹ Under the *Georgia statute it seems to be held that when [*323] action is brought in the interest of children for the loss of their father, the damages should be the present worth of a reasonable support for them during minority, according to the expectation of the father’s life, and in view of his condition in life, prospects, habits, etc.⁶⁰ In Pennsylvania the rule adopted is thus stated: “The loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his life time, and which would have gone for the benefit of his children, taking into consideration ability and disposition to labor, and his habits of living and expenditure.”⁶¹ In some other States the probable value of the nurture, instruction, and physical, moral and intellectual training which the parent for whose loss the suit is brought might

59—*McHugh v. Schlosser*, 159 Pa. St. 480, 486, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574. And see *Railway Co. v. Maddry*, 57 Ark. 306, 21 S. W. 472; *Florida Central R. R. Co. v. Foxworthy*, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149; *Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243. Though the husband has been separated from his wife and child for twelve years prior to his death and has contributed nothing to their support during that time, it does not follow that they are only entitled to nominal damages, as their legal rights remained the same, it appearing that the wife was not at fault. *Baltimore, etc., R. R. Co. v. State*, 81 Md. 371, 32 Atl. 201. Where the deceased left a widow only and earned one dollar a day which he spent for the support of himself and wife, the court held that the wife received the benefit of half that amount and that she

was entitled to a sum which at the current rate of interest would produce an income of \$150 a year and exhaust the principal at the end of deceased’s expectancy of life. *Louisville, etc., R. R. Co. v. Trammell*, 93 Ala. 350, 9 So. 870. In Tennessee it is held that the widow may recover for the loss of the counsel, society, etc., of the husband. *Railroad Co. v. Bentz*, 108 Tenn. 670, 69 S. W. 317, 91 Am. St. Rep. 763, 58 L. R. A. 690.

60—*David v. South Western R. Co.*, 41 Ga. 223. See, also, *Baltimore & Ohio R. R. Co. v. State*, 33 Md. 542; *Oakes v. Maine Cent. R. R. Co.*, 95 Me. 103, 49 Atl. 418; *Redfield v. Oakland Con. St. Ry. Co.*, 110 Cal. 277, 42 Pac. 822; *Coffeyville Mfg. Co. v. Carter*, 65 Kan. 565, 70 Pac. 635.

61—*SHARSWOOD, J.*, in *Pennsylvania R. R. Co. v. Butler*, 57 Pa. St. 335, 98 Am. Dec. 229. See *Pennsylvania R. R. Co. v. Brooks*,

have given to the children, are considered proper elements of damages.⁶²

In some cases the circumstances may be said to reasonably fix a maximum of recovery, because they set a limit to the probable ability to give assistance. Thus, if the deceased is a common laboring man, and it is not shown that he could bring to the assistance of the family other resources than his daily earnings, an award of five thousand dollars is clearly excessive.⁶³ So when the suit is brought for the benefit of the mother, an award so large that the interest upon it would exceed all his probable earnings is manifestly greater than the pecuniary loss could possibly be, where it appears that the deceased was without property or other expectations.⁶⁴

In England an award in favor of the father of seventy-
[*324] five *pounds was set aside in one case, where it appeared that he was old and infirm, and the deceased only assisted him in some work, from which he received three shillings and sixpence per week.⁶⁵ This seems a very strict application of the law. An American court would probably not disturb a verdict, unless the excess appeared more manifest.⁶⁶

Upon the general subject of estimating such damages the Supreme Court of Maine says: "It is evident that the pecuniary damages to be recovered under this statute can never be ascertained with exactness nor with any satisfactory degree of ap-

57 Pa. St. 339; *Cleveland, &c., R. R. Co. v. Rowan*, 66 Pa. St. 393; *Huntingdon, &c., R. R. Co. v. Decker*, 84 Pa. St. 419.

62—*Tilley v. Hudson River R. Co.*, 29 N. Y. 252, 86 Am. Dec. 297; *Ill. Cent. R. R. Co. v. Weldon*, 52 Ill. 290; *Castello v. Landwehr*, 28 Wis. 522; *Board of Comr's v. Legg*, 93 Ind. 523; *St. Louis, etc., Ry. Co. v. Haist*, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65; *Hoadley v. International Paper Co.*, 72 Vt. 79, 47 Atl. 169; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518.

63—*Ill. Cent. R. R. Co. v. Weldon*, 52 Ill. 290.

64—*Chicago, &c., R. R. Co. v. Bayfield*, 37 Mich. 205. See *Hutton v. Windsor*, 34 Up. Can. Q. B. 487; *Rose v. Des Moines R. R. Co.*, 39 Iowa, 246; *Fordyce v. McCants*, 55 Ark. 384, 18 S. W. 371; *Augusta Southern R. R. Co. v. McDade*, 105 Ga. 134, 31 S. E. 420.

65—*Franklin v. South Eastern R. Co.*, 3 H. & N. 211.

66—As to proper latitude to be allowed in estimating damages, see *Railroad Co. v. Barron*, 5 Wall. 90, 105.

proximation. Unlike ordinary questions of the legal measure of damages, this relates wholly to the future. There can never be knowledge. The conclusion arrived at must be based on probabilities instead of facts. The only facts that can be ascertained are those which occurred before or at the time of the death. From that data, what would probably have occurred had not the wrongful act or neglect of the defendant intervened, must be conjectured as carefully as possible. The circumstances of the deceased and of the beneficiaries are to be ascertained. The legal, family or other ties are to be considered. The age, capacity, health, means, occupation, temperament, habits and disposition of the deceased and of the beneficiaries are material to be known. There is some probability that these various circumstances shown to be existing at the time of the death would have continued in more or less degree had not the death occurred. They would be subject however to acceleration, retardation, interruption and even extinction by other circumstances which may possibly, or probably, or even surely occur after the death. These inevitable, probable, or even possible subsequent circumstances are therefor to be looked for and considered. Whatever result is arrived at must be reached from a careful balancing of the various probabilities."⁶⁷ In Tennessee it is said that "the assessment of damages in actions of this character does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion of the jury. The courts refuse to lay down any cast iron rules or mathematical formula by which such damages are to be ciphered out by juries. It is the duty of the court to point out the different elements proper to be considered in the assessment of damages, but it is erroneous to give the jury a rule by which to figure out the damages as they would a mathematical problem in cases like this, where the future earnings of the deceased and his expectation of life are mere prob-

67—McKay v. New England Missouri Pac. Ry. Co. v. Moffatt, Dredging Co., 92 Me. 454, 459, 60 Kan. 113, 55 Pac. 837, 72 Am. 460, 43 Atl. 29. See to same effect St. Rep. 343.

abilities.”⁶⁸ More definite rules are laid down by some courts.⁶⁹ It is held in New York that the measure of damages is not the cost of an annuity equal to the earnings of the deceased during his expectancy of life and that such cost cannot be shown, but that it is proper to show the deceased’s expectancy of life, his earnings, habits, and way in which he had supported his family.⁷⁰ “The sum given must be the present worth of the future pecuniary benefits of which the beneficiary has been deprived by the wrongful act, neglect or default of the defendant.”⁷¹

68—*Railroad Co. v. Spence*, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907. In Tennessee it is held that two classes of damages may be recovered. “First, damages purely for the injury to the deceased himself; second, the incidental damages suffered by his widow and children, or next of kin, from his death. In the first class are embraced damages for the mental and physical suffering, loss of time between the injury and death, and necessary expenses resulting to the deceased from the personal injuries. In the second class is embraced the pecuniary value of the life of deceased, to be determined upon a consideration of his expectancy of life, his age, condition of health and strength, capacity for labor and earning money through skill in any art, trade, profession, occupation or business, and his personal habits as to sobriety and industry; all modified, however, by the fact that the expectation of life is at most only a probability, based upon experience, and also by the fact that the earnings of the same individual are not always uniform. All of these elements are to be taken into consideration by the jury, and, after

weighing them all, they should assess such amount of damages as may be sufficient to compensate for the loss of the life whose value they are attempting to estimate.” *Davidson Benedict Co. v. Severson*, 109 Tenn. 572, 72 S. W. 967; *Freeman v. Railroad Co.* 107 Tenn. 340, 64 S. W. 1.

69—See *Louisville, etc., R. R. Co. v. Trammell*, 93 Ala. 350, 9 So. 870.

70—*Mix v. Hamburg-Am. S. S. Co.*, 85 App. Div. 475, 83 N. Y. S. 322; *Hinsdale v. New York, etc., R. R. Co.*, 81 App. Div. 617, 81 N. Y. S. 356; *Fajardo v. New York, etc., R. R. Co.*, 84 App. Div. 354, 82 N. Y. S. 912. But see *Railway Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886.

71—*Oakes v. Maine Central R. R. Co.*, 95 Me. 103, 106, 49 Atl. 418; *Railway Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886; *Central R. R. Co. v. Rouse*, 77 Ga. 393, 3 S. E. 307; *Ohio, etc., Ry. Co. v. Voight*, 122 Ind. 288, 23 N. E. 774. “The measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. As a

Life or accident insurance received by the beneficiaries in consequence of the death of the deceased may not be shown in mitigation of damages.⁷² Nor can the remarriage of the widow, when the suit is for her benefit.⁷³ The loss of a prospective inheritance is not a proper element of damages.⁷⁴ Funeral expenses may constitute an element of damages in some cases.⁷⁵

basis on which to enable the jury to make their estimate, it is competent to show, and for them to consider the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed—the end of it all being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus arrive at the pecuniary worth of the deceased to his family.” *Menddenhall v. North Carolina R. R. Co.*, 123 N. C. 275, 278, 31 S. E. 480. And see *Decatur Car Wheel & Mfg. Co. v. Mehaffey*, 128 Ala. 242, 29 So. 646; *Railway Co. v. Davis*, 55 Ark. 462, 18 S. W. 628; *Railway Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019; *Denver, etc., R. R. Co. v. Spencer*, 27 Colo. 313, 61 Pac. 606; *Clay v. Central R. R. & B. Co.*, 84 Ga. 345, 10 S. E. 967; *Wheelan v. Chicago, etc., Ry. Co.*, 85 Ia. 167, 52 N. W. 119; *Cooper v. Shore Elec. Co.*, 63 N. J. L. 558, 44 Atl. 633; *Cincinnati St. Ry. Co. v. Altemeier*, 60 Ohio St. 10, 53 N. E. 300.

72—*Sherlock v. Alling*, 44 Ind. 184; *Carroll v. Miss. Pac. R. R. Co.*, 88 Mo. 239; *Terry v. Jewett*, 78 N. Y. 338; *Illinois Central R.*

R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435; *Coulter v. Pine Tp.*, 164 Pa. St. 543, 30 Atl. 490; *Tyler S. E. Ry. Co. v. Raspberry*, 13 Tex. Civ. App. 185, 34 S. W. 794; *Harding v. Townshend*, 43 Vt. 536; *Clune v. Ristine*, 94 Fed. 745, 36 C. C. A. 450. See *Kellogg v. New York, &c., Co.*, 79 N. Y. 72; *Balt., &c., R. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *North Penn. Co. v. Kirk*, 90 Penn. St. 15. Lord CAMPBELL thought that in getting at actual damages the amount of an insurance policy that became payable at the death should be deducted. See note to 4 Best & S. 403.

73—*Chicago, etc., R. R. Co. v. Driscoll*, 207 Ill. 9, 69 N. E. 620; *Consolidated Stone Co. v. Morgan*, 160 Ind. 241, 66 N. E. 696; *Chicago, etc., Ry. Co. v. Lagerkrans*, 65 Neb. 566, 95 N. W. 2; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548. The probability of the widow's subsequent marriage should not be taken into account. *Baltimore & Ohio R. R. Co. v. State*, 33 Md. 542.

74—*Baltimore, etc., R. R. Co. v. Golway*, 6 App. D. C. 143; *Wiest v. Electric Traction Co.*, 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666.

75—*Murphy v. New York, etc., R. R. Co.*, 88 N. Y. 445; *Pennsylvania R. R. Co. v. Bantom*, 54 Pa.

In a suit for the death of a mother, where the only aid her children had received from her was derived from property, which was devised to the children, these facts may be shown in mitigation of damages.⁷⁶

Many of the statutes fix a maximum of recovery, five thousand dollars being a common limitation.

The action by the father for the negligent killing of his minor child cannot be joined with an action at the common law for a personal injury to himself caused by the same negligent act.⁷⁷

St. 495; *Cleveland, &c., R. R. Co. v. Rowan*, 66 Pa. St. 393. But see *Boyden v. Fitchburg R. R. Co.*, 70 Vt. 125, 39 Atl. Railway Co. *v. Sweet*, 57 Ark. 287, 21 S. W. 587. 771.

76—*San Antonio, etc., Ry. Co. v. Long*, 27 S. W. 113, 47 Am. St. Rep. 87, 24 L. R. A. 637. The pain and suffering of the deceased cannot be considered. *Dwyer v. Chicago, etc., Ry. Co.*, 84 Ia. 479, 51 N. W. 244, 35 Am. St. Rep. 322. It is not essential that the next of kin should have had a legal claim on the deceased. *Boyden v. Fitchburg R. R. Co.*, 70 Vt. 125, 39 Atl. 771. 77—*Cincinnati, &c., R. R. Co. v. Chester*, 57 Ind. 297. A suit will lie in admiralty upon the statute. *Holmes v. Oreg., &c., Ry. Co.*, 6 Sawy. 262. As to when the action arises with reference to limitation acts, see *Ewell v. Chicago, &c., Co.*, 29 Fed. 57; *Rutter v. Miss., &c., Co.*, 81 Mo. 169; *Lung Chung v. North. Pac., &c., Co.*, 19 Fed. 254.

